

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

No. 12,136

APPELLANT'S BRIEF AND APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

MICHAEL MARCLEY, by his mother and next friend,
ELSIE R. MARCLEY, and ELSIE R. MARCLEY, *For the United States Court of Appeals*
individually, *Appellants,* *For the District of Columbia Circuit*

vs.

H. O. McALLISTER, *Appellee.*

Joseph W. Stewart
CLERK

Appeal from the United States District Court
for the District of Columbia

RALPH F. BERLOW

KENT D. THORUP

Woodward Building
Washington, D. C.

Attorneys for Appellants.



No. 12,136

STATEMENT OF QUESTIONS PRESENTED

Does a contractor owe the duty to use reasonable care to remove a ladder from a building under construction on a school playground so as to prevent injury to a nine year old child who climbs the ladder as he would the playground equipment?



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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,136

MICHAEL MARCLEY, by his mother and next friend,
ELSIE R. MARCLEY, and ELSIE R. MARCLEY,
individually, *Appellants*

VS.

H. O. McALLISTER, *Appellee*.

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

This Court has jurisdiction of this appeal by reason of Title 28 of the United States Code, sections 1291 and 1294.

STATEMENT OF THE CASE

For the sake of convenience, appellants and appellee will be referred to hereafter as plaintiffs and defendant, respectively.

The infant plaintiff, Michael Marcley, lived with his mother, Elsie Marcley, in Bethesda, Maryland. His father and mother were divorced some years before and his mother had since become the sole support of Michael.

Since Mrs. Marcley was employed in Washington, D. C., it became necessary for her to employ someone to assume supervision of Michael while she was at work. Mrs. Marcley made arrangements with Mrs. Dooley, a friend and neighbor, to take care of Michael after school. Each day, after leaving her place of employment, Mrs. Marcley drove by the Dooley house to pick up Michael. This arrangement continued into the summer months.

The Dooley residence was located directly behind the Somerset School, the school which Michael attended. Mrs. Dooley could observe the school grounds from her home. (A. 12) Mrs. Dooley also hired a maid who came to her home three times per week to assist her in supervising the children (Mrs. Dooley had several of her own). (A. 13) The children were accustomed to playing either in the Dooley yard or in the adjacent schoolyard. (A. 12)

Separating the schoolyard from the Dooleys' yard was a fence. (A. 6) Between the end of the fence and a neighbor's garage, there was a two-foot opening, or gateway, which was used by the Dooleys and various children in the neighborhood as an access to the schoolyard. (A. 7) Sometimes as many as fifteen to fifty children used the gate each day to go to and from the schoolyard. (A. 12)

For more than a month prior to June 23rd, 1950, the day Michael was injured, the defendant, H. O. McAlister, had been engaged in constructing a connected addition to the Somerset School Building, and by the aforementioned date, the building had progressed to the point where the walls of the addition were completed above the first floor

windows, and the second floor was being formed. Several tiers of scaffolding had been erected around the inside of the new building to facilitate the laying of brick. Neither the windows nor the doors of the new building were blocked so as to obstruct entrance from outside. (A. 19)

The addition to the school was being erected upon a plot of ground which, prior to the excavation, had been used by school children as a place in which they could play dodgeball, jump rope, and other children's games. (A. 9, 13)

Dircetly adjacent to the construction work was a small slope and a set of steps which lead to permanent playground equipment such as a "Jungle Jim," which is a ladder-like affair used by children for climbing, and a "Giant Stride," from which the children swing on ropes. There were also swings and see-saws in the area. (A. 10, 11, 13)

On June 23rd, Michael, accompanied by two other playmates, Billy Dooley and Lyne Smith, aged 7 and 11, respectively, entered the school grounds through the gate in the Dooley yard, and began playing in the schoolyard, as had often been their custom. (A. 12) By this time the workmen had left the construction job for the day. It was while the children were playing in the schoolyard that they decided to "explore" the construction work, and the three children entered the unfinished building. (A. 11) Upon entering, they discovered one of several ladders (A. 9, 19) which had been left by the defendant leaning upright against the scaffolding inside the building. (A. 9, 11, 17) The three children climbed one of the ladders which they saw there and began playing around upon the uppermost tier of scaffolding. (A. 9, 11, 17) Michael, while playing with a saw-horse which he found on the scaffold, lost his balance and fell to the

ground. (A. 9) As a result of the fall, Michael sustained serious injuries, including a fractured skull.

Mrs. Marcle was not aware that Michael and the other children played in and about the construction work on the school grounds. (A. 8) Overwhelming testimony proved that there were no barricades, signs, or obstacles of any type in the vicinity of the construction work for the purpose of limiting access to the work area at the time Michael received his injuries. (A. 8, 10, 14) Defendant concedes that there was no watchman employed by him at the site of the injury. (A. 15)

This matter came to trial on November 10, 1953, the trial lasting four days. Among other evidence, plaintiff introduced a plat (Plaintiff's No. 1), photographs (Plaintiffs' 4a, 4b, 4c, 4d, 5a, 5b, 5c, 5d, 5e, 5f), and a motion picture film taken at the area shortly after the injury. (Plaintiffs' No. 6) At the close of plaintiff's case, defendant's motion for a directed verdict was properly denied.

During the course of its instructions to the jury, the Court used the following language in describing the standard of care to be applied to the defendant McAlister: (A. 19-20)

"Now, the standard that I have just outlined to you is not the standard applicable to Mr. McAlister. What duty was owing by Mr. McAlister to Michael Marcle? Mr. McAlister owed to Michael Marcle the duty to refrain from wantonly or willfully causing Michael harm, and the duty of not exposing Michael to hidden perils or dangers which Michael could not avoid by reasonable care on his own part.

"In general, Mr. McAlister had the duty of maintaining the area of the construction work in a condition which would not unnecessarily or unreasonably expose Michael to danger. Wilful or wanton conduct

is conduct characterized by recklessness and disregard for the rights of others."

Later the Court repeated substantially the same instructions: (A. 20-21)

"Ladies and gentlemen of the jury, it has been called to my attention that several times I have spoken of negligence on the part of one person or another person.

"Now, in referring to negligence insofar as the charge of negligence with respect to Michael or Mrs. Marcley, you are told that the negligence is the failure to use ordinary care. That is the failure to use the care which an ordinarily prudent person would exercise under the circumstances, and that is the doctrine of ordinary care, and that is the doctrine which is applicable to the charge of negligence or contributory negligence on the part of the Marcleys.

"Now, I tried to make it clear to you that when reference is made to negligence with respect to Mr. McAlister, that the standard of ordinary care is not applicable to him.

"The standard with reference to him is he owes the duty to refrain from wantonly or wilfully causing Michael harm, and he owes the duty of not exposing Michael to hidden perils or dangers which Michael could not avoid by reasonable care on his own part.

"And he had the duty of maintaining the area of the construction work in a condition which would not unnecessarily or unreasonably expose Michael to danger.

"Now, wilful or wanton conduct is conduct characterized by recklessness or disregard for the rights of others and when I referred to negligence on the part of Mr. McAlister, I meant it in the sense of this definition.

"That is, you are to determine whether or not he violated his duty, as I have explained his duty to you, and it is only if he had violated the particular duty that I have described to you that he would be guilty of negligence in this case.

"You may now retire."

Objection to the standard of care applied to Mr. McAlister was made by counsel for plaintiff. (A. 20)

STATEMENT OF POINTS

1. The District Court erred in instructing the jury that the plaintiff must prove wilful and wanton negligence on the part of the defendant, the infant plaintiff having been an invitee as to the defendant at the time his injuries were sustained, and entitled to the exercise of ordinary care by the defendant and his agents.

SUMMARY OF ARGUMENT

The infant plaintiff, when injured, was properly in the playground and was therefore an invitee, and in failing to take any precautions for the safety of the plaintiff, the defendant did not exercise the degree of care required.

ARGUMENT

At the outset, the Court erred in instructing the jury that the defendant owed the infant plaintiff only the duty of refraining from wanton and wilful negligence. The Court then compounded its error by a repetition of this instruction at the end of its charge highlighting the error to the further prejudice of the plaintiff.

In determining the standard of care to be applied to the defendant McAlister, the Court relied upon several Maryland cases, *Grube v. Baltimore*, 132 Md. 355, 103 A. 948 (1918); *Baltimore v. DePalma*, 137 Md. 179, 112 A. 277 (1920); *State v. Longeley*, 161 Md. 563, 158 A. 6 (1931); *State v. Baltimore Fidelity Warehouse Co.*, 176 Md. 341, 4 A. 2d. 739 (1939). (A. 5) Not one of the aforementioned cases is in point.

The *Grube* case, *supra*, decided in 1918, is one of a long line of "Telephone Pole" cases, most of which have held that one who climbs a telephone pole is a licensee or trespasser. See 6 A.L.R. 2d. 783. The plaintiff, a boy 10-11 years old, had been injured as a result of climbing upon a power company pole in a schoolhouse yard. The pole was planted one foot from the fence surrounding the yard, and contained spikes for climbing. The boy had climbed upon the fence, and, by reaching, gained access to the spikes by which he climbed the pole. Affirming a judgment for the defendant, the Court pointed out in its opinion that the spikes had been removed from the lower part of the pole, so a boy could not reach one from the ground, and that everything that could reasonably be expected or required of the defendant was done, unless it be that the pole was not removed. The Court, in other words, was careful to point out the precautions that the defendant had taken to prevent such an accident. The Court quotes with approval the opinion of Judge Urner in *Stansfield v. C. & P. Tel. Co.*, 123 Md. 120, 91 Atl. 149, 52 L.R.A. (N.S.) 1170 (1914), in which it is said that where, as in that case, "those engaged in the distribution of electric current have placed their wires above and beyond the sphere of peril to the public and to the occupants of neighboring premises, it would be subjecting them to an unduly strict responsibility to require them to provide against the possibility that their own appliances might be utilized by strangers as a means of access to the conditions which proved to be injurious." But where is it shown in the instant case that the defendant had placed the ladder "above and beyond the sphere of peril to the public?" Overwhelming evidence points to the fact, to the contrary, that the ladder which Michael climbed was negligently allowed to remain upright to provide tempting access to the place from which he was to fall.

Baltimore v. DePalma, supra, involved a child who was injured by a pile of lumber while playing on a lumber pier. A readily distinguishing factor between the *DePalma* case and the instant case is that in the former, the child was injured in a business place where he had no right to be. There was no playground or amusement park nearby, and the owner of the pier had never encouraged children to use the pier for their play. In other words, there was no hint of an invitation, express or implied, to the children to play on the pier.

The case of *State v. Longeley, supra*, involved a child who drowned in the bottom of a quarry on defendant's property. Again, we have a case where the child was injured on private property—in a place at which he had no right to be.

In *State v. Baltimore Fidelity Warehouse Co., supra*, an infant was drowned while playing on defendant's raft, which was moored at the foot of a public highway. In order to board the raft, the child had to climb a stone wall, which was, in the words of the Court, at page 345, "a guard and a warning and an obstacle placed in the way to prevent unrestricted access at this point to the water." No such guard, warning, or obstacle was placed in Michael's way to prevent access to the ladder.

The foregoing are the cases relied upon by the Court to uphold the standard of care applied to the defendant. In each of these cases, of course, the injured or deceased infant was found to be either a licensee, or trespasser, and, as such, "must take the premises as he finds them."

The dissimilarity between these cases and the case at bar is obvious for the reasons pointed out. In the instant case, the following elements compel the conclusion that the infant plaintiff was an invitee at the time of the injury: (1) the dangerous appliance was located on a playground; (2) access to the playground was not re-

stricted in any way; (3) the appliance causing the injury was only a few feet from playground equipment used by children for climbing; (4) the appliance proximately causing the injury was a ladder, standing in an upright position; and (5) the presence of children at the playground was known to the defendant and he consented to their presence.

There is no Maryland case concerning the status of an infant injured while playing on a playground, when no precautions are taken to prevent such injury by the person controlling the appliance which caused it.

A recent New Jersey case, *Terranella v. Union Bldg. & Const. Co.*, 3 N.J. 443, 70 A. 2d. 753 (1950) presents a factual situation strikingly similar to the instant case. It involved an action by the administrator of the estate of an 11 year old boy, Richard Terranella, against a construction company. The defendant company had been engaged in installing a storm sewer across a playground, and had placed on the playground fourteen concrete pipes, each four feet long, five feet in diameter, and each weighing 5180 pounds. The company did not tie or secure the pipes, and no watchman was placed over them. During the week the children in the playground had been playing with the pipes and rolling them around on the ground. At the time of the accident, several boys, aged 9-12, were rolling the pipes. The decedent fell between two of the pipes and was killed.

The trial court directed a verdict in favor of the construction company. However, the Supreme Court of New Jersey reversed the trial court and ordered a new trial as to the construction company. In its opinion, the Supreme Court emphasized that the facts in this case were "materially at variance" with the facts of the case upon which the trial court had relied in finding that the child had exceeded his invitation.

The case to which the Supreme Court referred (*Friedman v. Snare & Triest Co.*, 71 N.J.L. 605, 61 A. 401, 70 L.R.A. 147, 108 Am. St. Rep. 764, 2 Ann. Cas. 497) involved a child who was injured while playing on a pile of girders which were stored on private property subject to a public easement for use as a sidewalk. The court found that the child had exceeded the easement and was thus a licensee or trespasser.

In pointing out the distinction between the *Friedman* case and the *Terranella* case, the court said, at 755:

"In the case presently before us, we are concerned with the death of a child who, together with a group of other children, was using a restricted area specifically designated as a place for play. Their occupation and use of the premises was in the natural course of events and was or should have been anticipated and expected. The land was dedicated and posted as a playground, expressing an invitation to the children of the neighborhood to use it for that purpose.

"Those making use of the grounds and equipment there provided were invitees acting within the precise scope and intent of the invitation. As such they were owed the duty of reasonable care. An owner of premises who by invitation, express or implied, induces a person to come upon the premises is under a duty to exercise ordinary care to render the premises safe for the purposes embraced in the invitation. . . . This duty rests also upon an independent contractor employed by the owner of the lands. . . .

"True, the pipes stored in the playground were not intended to be part of the facilities provided for play, but this does not, in the exercise of reasonable care, impose upon the immature children who are the ordinary users of the playground the duty of discriminating between the equipment which is intended for their use and enjoyment and that which, in an area devoted to their pleasure, is placed within their easy reach and access but is intended for other purposes.

"No sign, guard or warning was given or provided to assist them in differentiating between what was

installed for their play and amusement and what was to be avoided under penalty of such dire consequences as here resulted."

We believe the facts in the case at bar are in a strong sense analogous and in harmony with the facts in the above case.

Pate v. Parker, 180 Ore. 330, 177 P. 2d. 250, (1947) is an Oregon case which demonstrates this prevailing doctrine. A child, playing alongside a street excavation, was killed by an overhang of earth which fell upon him and a friend after the workmen had left for the day. The court holding for the plaintiff, said that the child was not a trespasser, since the place was public property, unfenced, open to the street, and devoid of "no trespass" signs, and children had played there for years. The court quoted with approval from *Fink v. Missouri Furnace Co.* 10 Mo. App. 61 (1881) which involved a substantially similar situation:

"Persons who carry on a dangerous work in a neighborhood where there are many small children are fairly bound, we think, to take notice of the habits of small children. . . . And while it is true that no person is bound to take better care of his neighbor's children than his neighbor is bound to take care of his own children . . . yet in a neighborhood where there are many small children, a proprietor ought reasonably to anticipate that small children will, in spite of the exercise of due care on the part of their parents, frequently escape and run into danger."

In *Gimmestad v. Rose Brothers*, 194 Minn. 531, 261 N.W. 194 (1935), a 5 year old boy was injured while climbing over a pile of insecurely piled salvage material, placed on a private lot by defendants who were in the wrecking business. The case was not submitted to the jury on the attractive nuisance doctrine, but on the issue of whether defendants failed to use reasonable care, in view of the fact that children were accustomed to playing in the lot.

The Supreme Court of Minnesota affirmed judgment against the defendant.

In a leading Washington case, a 6 year old girl broke her arm in a fall to a concrete floor from an exercise ladder located in the school basement. The ladder was intended for use by older children. Affirming judgment for the infant plaintiff, the court pointed out the care which was so obviously lacking in that situation in the following language: "It is also argued, and the thing seems self-evident, that the upright ladder should have been so constructed as to be removed when not in use, so that small children, for whose use the ladders were not intended, could not climb upon the horizontal ladder in the absence of supervisors." *Howard v. Tacoma School District No. 10*, 88 Wash. 167, 152 P. 1004 (1915).

Finally, in another case involving injuries from conduit pipes, an Ohio court expressed a view similar to that in the *Terranella* case, *supra*. In *Gottesman v. City of Cleveland*, 142 Ohio St. Rep. 410, 52 N.E. 2d. 644 (1944), a four year old boy was killed while playing in a city park when his head was crushed by a conduit pipe which was left there by city workmen. These pipes had not been blocked so as to prevent such injury, as in the *Terranella* case, and judgment for defendant municipality was reversed.

The so-called "attractive nuisance" doctrine is not followed by the courts of Maryland, nor does it constitute any part of the plaintiffs' case, for the reason that that doctrine applies only to owners or occupants of private premises, and not to places to which persons are, as here, expressly or impliedly invited.

It becomes apparent, therefore, that Michael Marcley, while playing with his friends on the playground of the Somerset School and in the addition to the school which was then under construction, was an invitee as to the con-

struction company. He was using an area specifically designated as a place for play. He, as in the *Terranella* case, failed to discriminate between the equipment which was intended for his use and enjoyment, and that which, although placed within the same area, was intended for other purposes. This failure to discriminate, especially as to a nine year old boy, loses any trace of culpability upon consideration of the juxtaposition of the playground equipment and construction equipment on the Somerset playground. As an invitee, therefore, Michael was owed the duty by the defendant, McAlister, to exercise ordinary care. However, the evidence and testimony has established that McAlister not only did not remove the ladder from the upright position against the scaffolding, but, further, that he did not furnish any barricade, watchman, sign, or anything of the sort to prevent the occurrence of such injury which would have been foreseen by a reasonable man, and proper precautions taken.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court erred in instructing the jury that the plaintiff must prove wanton and wilful negligence on the part of the defendant, and that the judgment entered herein should be reversed for the reasons set forth in this brief and that a new trial should be granted of the issues herein.

RALPH F. BERLOW

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Washington 5, D. C.

Attorneys for Appellants.

APPENDIX



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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,136

MICHAEL MARCLEY, by his mother and next friend,
ELSIE R. MARCLEY, and ELSIE R. MARCLEY
individually, *Appellants*,

vs.

H. O. McALLISTER, *Appellee*.

**Appeal from the United States District Court
for the District of Columbia**

APPELLANTS' APPENDIX

301 Filed Aug 21 1951 Harry H. Hull, Clerk

Complaint for Damages

(Negligence)

1. This Court has jurisdiction in this cause inasmuch as the amount in suit is in excess of \$3,000.00.

2. On, to wit, June 23, 1950, the minor plaintiff, Michael Marcley, due to the negligence of the defendant in the construction and maintenance of the Somerset School Annex in Bethesda, Montgomery County, Maryland, was caused to fall in and upon said premises, thereby sustaining the following injuries; a fractured skull, cuts and bruises about the body, extreme shock, pain, nervous disability, injuries to brain and nervous system, and other physical injuries as a result of which he will be permanently injured; the minor plaintiff further suffered loss of time in his schooling. The plaintiff, Elsie R. Marcley suffered loss of time from her occupation as a result of the necessary care and treatment of her son, expenses for hospitals, doctors, medicines and other expenses, whereby she has been damaged to the extent of \$2500.00.

WHEREFORE the plaintiff, Michael Marcley, by his Mother and next friend, Elsie R. Marcley, asks judgment in the sum of \$50,000.00 against the defendant, and
and the plaintiff, Elsie R. Marcley, individually,
302 asks judgment in the sum of \$2500.00 against the defendant, besides costs.

CANFIELD, SCHELL, HANNAN &
CASTELLO,

BY: /s/ William T. Hannan
William T. Hannan
Attorneys for plaintiffs,
637 Woodward Building,
Washington 5, D. C.

303 Filed Sep 5 1951 Harry M. Hull, Clerk

Answer to Complaint for Damages

Comes now the defendant, H. O. McAlister, by and through his attorney, Cornelius H. Doherty, and for answer to the complaint filed herein avers as follows:

1. The defendant admits that sufficient facts are pleaded to bring the matter within the jurisdiction of this Court.

2. The defendant denies that the plaintiff, or either of them, were in any way injured or damaged by reason of any negligence of the defendant, his agents or employees.

3. The defendant avers that the injuries or damages of the plaintiffs, or either of them, were caused by reason of the negligence of the infant plaintiff in failing to exercise reasonable care for his own safety and the negligence of the plaintiff, Elsie R. Marcle, in failing to properly supervise and care for the infant plaintiff, and that it was their negligence which was the sole proximate cause of any injury or damage sustained.

The premises considered, defendant prays that the said complaint be dismissed with costs.

/s/ Cornelius H. Doherty
Cornelius H. Doherty
1010 Vermont Ave., N.W.
Washington, D. C.
Attorney for Defendant

I certify that a copy of the foregoing Answer was mailed to William T. Hannan, Esq., 637 Woodward Building, on the 4th day of September, 1951.

/s/ Cornelius H. Doherty
Cornelius H. Doherty

306 Filed Nov 16 1953 Harry M. Hull, Clerk

Verdict and Judgment

This cause having come on for hearing on the 10th day of November, 1953, before the Court and a jury of good and lawful persons of this district, to wit:

Charles W. Brogden

Bernardo J. Capretti

Luther R. Bruner

Guy P. Hawkins

Edwin G. Baines

Fred D. Keesee

John M. Taff

Mary J. Sutherland

Arthur T. Meadows

Anita R. Jenkins

Charles H. Lee

Thelma L. Ferguson

who, after having been duly sworn to well and truly try the issues between MICHAEL MARCLEY, by his Mother and next friend, Elsie R. Marcley and ELSIE R. MARCLEY, individually, plaintiffs and H. O. MCAlister, defendant and after this cause is heard and given to the jury in charge, they upon their oath say this 16th day of November, 1953, that they find for the defendant against said plaintiffs.

WHEREFORE, it is adjudged that said plaintiffs take nothing by this action, that said defendant go hence without day, be for nothing held and recover of plaintiffs his costs of defense.

HARRY M. HULL, Clerk,

By /s/ Raymond D. Clark

Deputy Clerk.

By direction of

Judge /s/ BURNITA SHELTON MATTHEWS

(N)

307 Filed Dec 14 1953 Harry M. Hull, Clerk

Notice of Appeal

Notice is hereby given this 14th day of December, 1953 that Elsie R. Marclely individually and as parent and next friend of Michael Marclely, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the judgements of this Court entered on the 16th day of November in favor of the Defendant, H. O. McAlister.

CANFIELD, SCHELL, HANNAN &
CASTELLO

By: /s/ Ralph F. Berlow
Ralph F. Berlow
Attorneys for Plaintiffs
637 Woodward Building
Washington 5, D. C.

* * * *

318 Filed Jan 13 1954 Harry M. Hull, Clerk

*Order Denying Motion for Leave to Proceed in Forma
Pauperis*

Upon consideration of the motion of plaintiffs for leave to proceed in forma pauperis, the defendant's memorandum in opposition thereto, and argument of counsel, and it appearing that the sole question to be presented by an appeal is whether the court erred in instructing the jury that the minor plaintiff when injured in Maryland was a licensee, and it further appearing that such instruction was in accordance with the Maryland law, *Grube v. Baltimore*, 132 Md. 355, 103 A. 948; *Baltimore v. De Palma*, 137 Md. 179, 112 A. 277; *State v. Longeley*, 161 Md. 563, 158 A. 6; *State v. Baltimore Fidelity Warehouse Co.*, 176 Md. 341, 4 A.2d 739, and that there is no substantial question of law which justifies an appeal herein, and that, therefore, said appeal is not taken in

good faith, it is by the Court this 13th day of January, 1954

ORDERED that the motion of plaintiffs for leave to proceed in forma pauperis be and it hereby is denied.

/s/ Burnita Shelton Matthews
JUDGE

* * * *

3

Elsie R. Marcley

* * * *

Direct Examination

* * * *

6 Q And where is the house of the Dooleys' in reference to the Somerset School? A It is right next, the school yard.

Q Well, does the right side of their house abutt on the school yard or is the school yard behind their house?

A The school yard is behind their house and their backyard, separated by a fence.

Q And what separates their property from the school yard? A It is a fence except that the fence doesn't make a complete separation.

7 Q Does it—you say that the fence does not make a complete separation? Where does the fence stop? A It stops a few feet short of a neighbor's garage which forms the rest of the boundary of their yard.

* * * *

14 Q And did you on those occasions have an opportunity to observe whether other children, aside from your son, used that area where the fence stopped as a means of going to the school ground? A Yes, they did. The Dooleys' backyard was a popular place for the

neighborhood children, and many of them went through there to get over here (indicating) to play.

* * *

16 Q Would you point out on the diagram the area indicating the addition to the school? That is the part I am talking about. A That was part of the school playground that came along side the school like this (indicating).

Q Had you ever had an opportunity to observe Michael or any other children playing in that area— A (interposing) Yes.

Q (continuing) prior to the beginning of the work? A Yes.

Q There is a shaded area on the diagram. 17 Would you tell us what that represents? A This (indicating) one?

Q Yes. A That was a slight bank. The school was on a higher level than this part of the grounds here (indicating), and that was just a sloping bank with some steps here (indicating).

But the children evidently ran down the bank a great deal of the time, because it was sloping and worn there.

* * *

49

Cross-Examination

BY MR. DOHERTY:

* * *

58 Q (interposing) And then you don't know that after the construction started there was a fence or a barricade put across this (indicating) whole part here, blocking off the entire entrance to this part, so that even the school busses couldn't go up there to unload? Did you ever see a barricade— A (interposing) I

never saw a barricade; no, sir.

59 Q Had you ever looked to see if there was any barricade from the time the construction started?

A No, sir.

* * *

60 A Well, I don't know about when the construction was going on, because I don't remember seeing the school ground then, but before that, they played—

THE CLERK OF THE COURT: (interposing) Mrs. Marcley, would you speak louder?

THE WITNESS: Before that, the children played, I understood, all over the school grounds, including
61 in that section, (indicating).

Recess, I think, was more organized play, when a teacher would take them to a certain place or ball pool or a place like that for an organized game, you see.

* * *

62 Q Mrs. Marcley, what was Mrs. Dooley's obligation under your agreement with her as to the care of this child? A It was to take care of him as she did her own children.

Q And had you ever heard about the child playing around this construction before this? A No, sir.

Q So you had no knowledge whatever that Michael was playing around up in this new construction in the school prior to the time that he fell? A I knew that he played on that playground at school. The children played there many days after school. I didn't know that the construction was that far along.

* * *

68 *Lyne S. Smith*

was called as a witness for and on behalf of the Plaintiffs, and being then and there duly sworn by the Clerk of the Court, assumed the witness stand and testified as follows:

Direct Examination

BY MR. BERLOW:

Q Will you state your full name, please? A Lyne Starling Smith.

Q How old are you, Lyne? A Fourteen.

* * * *

70 Q After school where would you—during those times where would you usually play? A Well, usually we played on the playground or on that construction.

Q I can't hear you. A We would usually play on the playground or that construction.

Q When you say the playground, do you refer to the playground that was on the school grounds? A Yes.

* * * *

76 Q But some time before the construction work was begun there was this equipment up in the area where the work was later done. Is that correct? A Yes.

Q Were there any other activities carried on in that area or around by the equipment? A Well, I think we played dodge ball and socker and various games with balls.

* * * *

78 Q Now, would you show us on that diagram where you were playing at that time? A Well, we were playing right in this area here (indicating). We came up a ladder up here and around the platform.

Q I can't hear you. A We came up a ladder here (indicating) and then they walked around some platforms that were here (indicating), and he was throwing a saw horse across from one platform to the other and he fell right about here.

* * * *

79 Q Was there any fence separating the equipment or any barricade of any sort? A I don't think so.

Q Do you recall any barricades at all in that area? A No.

Q Was there a barricade—your answer is you recall no barricades then? A Yes.

* * *

90 Q On June 23rd, Lyne, when Michael was injured, did you observe him climbing a ladder? A Yes.

Q And did you climb a ladder? A Yes.

* * *

91 Q As you were on the ground and looked up, did you see anything resting or on the brick work that was there? Did you see any object? A What do you mean?

Q Well, before you climbed up, did you climb to go and get something or just to play around up there? A Just to play around, explore.

* * *

98 BY MR. BERLOW:

Q How many jungle jims are there on the playground now? A Now, there are two.

Q How many were there on it at the time when Michael was injured? A One.

* * *

99 BY MR. BERLOW:

Q How far was the jungle jim from the ladder which you and the other two children climbed? A Oh, about twenty feet, I guess.

MR. DOHERTY: What?

MR. BERLOW: About twenty feet, she said.

* * *

100 Q Now, is there any other playground equipment on that picture? A On the left side there is a giant stride. This is the smaller of the—

Q (interposing) Is there more than one giant stride?
A There is just one in this picture, but there are two.

* * * *

101 Q Lyne, did you pick up that ladder and put it where it was? A No.

102 Q Was the ladder there when you arrived there?
A Yes.

Q Did you see anyone else put that ladder there?
A No.

* * * *

Cross-Examination

BY MR. DOHERTY:

* * * *

111 Q What was Michael and this other boy, Billy, doing in the place? A In the construction, you mean?

Q Yes. A Just exploring around.

* * * *

122 *Catherine R. Dooley*

was called as a witness for and on behalf of the Plaintiffs, and being then and there duly sworn by the Clerk of the Court, assumed the witness stand and testified as follows:

Direct Examination

BY MR. BERLOW:

Q Will you tell us your full name, please? A Catherine Roseanne Dooley.

Q Where do you live, Mrs. Dooley? A 4616 Drummond Avenue.

Q And with whom do you live at that address? A My husband and my children.

Q How many children do you have? A I have five children.

* * * *

127 Q What would they do after their return from school? A Make themselves at home, change any school clothes that had to be changed or put on play clothes, or raid the icebox like most growing boys do, and sometimes they would play in the house if it was cold or they would play outside if it was nice.

Q And when they played outside where would they usually play? A In the backyard.

Q Would they play on the school grounds? A They did go over there quite a few times.

Q And would—this is after school? A After school.

Q Would you observe other children in the neighborhood playing in the school grounds? A Yes.

Q Now, when Michael and Billy went to school, could you tell us what their route was to get to the school? A Out the fence out the backyard; this two feet passageway between the garage and the, and the fence.

* * * *

131 Q Now, in the course of the day, an average day, would you estimate how many children would follow that route through your fence to the playground? A Well, between coming home for lunch, do you mean?

Q Yes. A Children that would come—

Q (interposing) For all purposes in the course of a normal day? A Oh, I would say fifteen to fifty. Sometimes there were more children and sometimes there weren't so many. I didn't count them.

* * * *

132 Q Now, prior to that time, in the area where the addition was being placed on the north side of

the building, prior to that time what had that area been used for? A Well, it was space.

I don't know that there was anything really there other than just space around the school. And in the early spring the children would have their little flower gardens there and each class would come out around the fence there and scratch up the dirt and plant some flowers and things.

And occasionally the girls would play jump rope there. And there was some sort of a ball game they used to play. I don't know what it was, but I know I have been in my yard when the ball would come over the fence and the children would come over and get it and go back out with it.

Does that answer your question?

Q Yes.

Now, in the area where the equipment was, Mrs. Dooley, would you tell us what some of that playground equipment was? A You mean down in the playground equipment area?

Q Yes. A Oh, there were swings and seesaws, what we used to call a "May pole". Children hold onto these things and swing around.

And there was, I think, a badminton court or
133 some such thing. And they had some circular things drawn on the concrete or patterns—whatever it was—where they played games. And then there was a jungle jim where the children climbed.

Q At this time in June of 1950, did you have anyone beside yourself to assist you in watching the smaller children? A Yes, I had a maid three days a week.

Q And do you recall whether this maid was with you on June 23rd of 1950? A Well, she usually worked on Mondays, Wednesdays and Fridays, but I don't remember whether she was there on that particular Friday or not.

* * * *

135 Q I show you Plaintiffs' Exhibit No. 4c and ask you if that picture shows you the area where the child was? A Yes, it does.

Q And is that spot marked in any way? A
136 It is with a—

Q (interposing) There are several marks on the picture. Do one of those marks indicate where the child was when you found him? A Yes, it does.

Q Which mark is that? A Right down here (indicating).

Q It looks like an O? A Yes.

Q Would you tell us what he looked like when you saw him there? A Well, there was some bricks on his legs and I looked at him and could tell that he was hurt. He was sort of moaning and sort of a muffled moan, and his hands were drawn in like this (indicating).

He was lying on his back. And his feet sort of were drawn in too. And then I noticed his right eye lid was swelling and something just told me not to try and pick him up or I knew I couldn't do anything for him, and I kept thinking, oh, thank goodness, that help is on the way.

And I could hear the sirens coming then. So I ran down to the Cumberland entrance to the school to motion to them what way to come so that they wouldn't have trouble finding him like I did.

Q Now, when you went to find Mike, did you
137 follow the usual route through the back fence? A
Oh, yes.

Q And did you find your way obstructed by any barricades or anything of that nature? A A pile of sand, some cinder blocks and a pile of bricks; something here and there.

Q Where was the pile of sand? A Not far from our, our—I call it a gate. It was really no gate there; the passageway.

Q Had you observed the children playing in that sand prior to this time? A Yes. They had played in the sand pile.

Q Did you notice anything which looked like a constructed barricade or fence? A What?

Q A barricade or fence, something that was deliberately put there to keep—obstruct people from going where the construction was? A No, I didn't.

Q Did you see any signs? A Any signs?

Q Any signs with writing on them? A No. I did not see any signs.

Q Prior to this time had you ever seen a watch-
138 man at the construction work? A No.

Q What time would the man usually leave the job? A Sometimes after school was out. I guess it was four or 4:30. I don't really know.

Q Now, at any time do you ever recall seeing a watchman there after four o'clock?

MR. DOHERTY: You can see there is no use questioning her about that. We will concede that we had no watchman there. There was no obligation for it.

* * * *

156

Billy Dooley

was called as a witness for and on behalf of the Plaintiffs, and prior to being duly sworn by the Clerk of the Court the following preliminary examination was had as follows:

157 BY MR. BERLOW:

Q Billy, how old are you? A Ten years old.

* * * *

165 Q But, Billy, I show you a picture here. I ask you to look at that.

THE COURT: What is the number, please?

MR. BERLOW: Oh, excuse me.—which has been marked Plaintiffs' Exhibit No. 4d.

BY MR. BERLOW:

Q Does that look like the ladder you climbed up, Billy? A No, it doesn't. It was a ladder that was already made at the building, I think, it was.

Q Already made? A Yes. They made it at the building.

THE COURT: What was that answer? It was what?

THE WITNESS: Made at the building.

THE COURT: Made at the building?

THE WITNESS: Made—

THE COURT: (interposing) You mean that you saw them making it?

THE WITNESS: Well, I didn't see them making it. They were making it when they were building the place too. I didn't see them.

MR. DOHERTY: If your Honor please, I think maybe I can explain what he means.

MR. BERLOW: I think he can. I object to this.

THE COURT: Very well.

MR. DOHERTY: All right.

MR. BERLOW: He can explain it.

BY MR. BERLOW:

Q Would you explain what you mean by that?

What was the difference between the ladder you climbed up and this ladder? Did it look any different, Billy?

A Yes, it looked different.

Q Was it bigger or smaller? A It was smaller.

Q How far up did it go, Billy? A As far as the top. It was jus tabout as tall as this (indicating); not exactly.

Q Almost as tall as that one, wasn't it? A Almost.

Q Now, do you see those (indicating) rungs? These things here running sideways across the ladder?

Were these things on the other ladder, too? A Yes,

they were except they were made out of boards,
167 thick. They weren't rounded off.

Q Remember when you climbed up the ladder, did the ladder move at all? A It shook a little bit. It shook a little bit in the middle and it shook a little bit. It shook when somebody went up it.

Q What did you do when you got up on top? Did you walk around at all? A Yes, walked around and looked down and played.

Q You were the only one way up there walking around? A No. Lyne and Mike were—

Q (interposing) They were up there with you? A (The witness nodded affirmatively.)

Q Who was the biggest one of the three? A Lyne was.

Q Who was the smallest? A Me.

Q Did you see Mike fall down, Billy? A Well, I saw him part of the way, but I didn't, I didn't look.

* * * *

170

Cross-Examination

BY MR. DOHERTY:

* * * *

176 Q Can you describe that ladder a little more fully that you said you used to go up on the, up to this higher floor or to the higher levels? A Well, it was thick boards so that we climbed on the rungs with thick boards, about this thick (indicating).

Q Was it straight up or was it something that you walk around? A It was leaning up, leaning up like a regular ladder would lean.

Q And was that on the inside of the building or on the outside? A The inside.

* * * *

219

Horace O. McAlister

was called as a witness for and on behalf of the Defendant, and being then and there duly sworn by the Clerk of the Court, assumed the witness stand and testified as follows:

Direct Examination

BY MR. DOHERTY:

Q Mr. McAlister, now you keep your voice up so we can all hear you. What is your full name? A Horace O. McAlister.

Q And where do you live? A Now I live at 507 Archer Way, Colesville, Maryland.

Q And what business are you in? A I am in the general contracting business.

Q And directing your attention to June of 1950, were you in that business then? A I was.

Q And what were you constructing—were you constructing an addition to the Somerset School in Bethesda, Maryland? A I was.

* * * *

226 Q And in what stage of the construction was your building then? A Oh, we were forming the second floor, meaning by—putting concrete pans in to pour concrete on.

Q And was this a brick construction on the outside? A Yes, sir.

227 Q And where were the platforms for the laying of the bricks? Were they on the inside or on the outside? A On the inside.

* * * *

229

Cross-Examination

BY MR. BERLOW:

Q How many ladders were there used on the job? A

I don't, I don't know. I don't know. We had quite a few ladders there, but I don't know how many they were using.

* * * *

230 Q You are sure that there is more than one ladder there, aren't you? A By those pictures I think I saw some ladders, yes, sir, down laying on the side, stacked up, weren't they?

Q Here, you can look at the pictures. A Well, maybe not, maybe not. No, I'm not sure; I'm not sure. There was more than one ladder there. If it's not any—I thought I did see some ladders stacked on top of each other laying down on a picture yesterday.

Q Is that the way ladders should be after you complete your job? A We try to do that at all times.

* * * *

242 Q Was there anything in the windows to block them? A No, the scaffold is behind the windows which you can see by these pictures.

Q Well, did they go up in front of the windows to keep somebody from going in? A What?

Q The scaffold, or, was it just down on the level of what would be a windowpane some day? A Oh, it was down level. It was off the floor but it wasn't—the windows are not closed, as you can see, other than the scaffold behind them.

* * * *

270 *The Court's Charge To the Jury*

* * * *

276 Now the standard that I have just outlined to you is not the standard applicable to Mr. McAlister. What duty was owing by Mr. McAlister to Michael Marcley? Mr. McAlister owed to Michael Marcley the duty to refrain from wantonly or wilfully causing Michael

harm, and the duty of not exposing Michael to
 277 hidden perils or dangers which Michael could not
 avoid by reasonable care on his own part.

In general, Mr. McAlister had the duty of maintaining the area of the construction work in a condition which would not unnecessarily or unreasonably expose Michael to danger. Wilful or wanton conduct is characterized by recklessness and disregard for the rights of others.

* * * *

293 MR. BERLOW: Well, I couldn't—even though
 I object to the standard I can't conceive of those
 instructions being better drawn than they were. I don't
 see how it could be done.

* * * *

THE COURT: Ladies and gentlemen of the jury, it has been called to my attention that several times I have spoken of negligence on the part of one person or another person.

Now, in referring to negligence insofar as the charge of negligence with respect to Michael or Mrs. Marcley, you are told that the negligence is the failure to use ordinary care. That is the failure to use the care which an ordinarily prudent person would exercise under the circumstances, and that is the doctrine of ordinary care, and that is the doctrine which is applicable to the charge of negligence or contributory negligence on the part of the Marcleys.

Now, I tried to make it clear to you that when reference is made to negligence with respect to Mr. McAlister, that that standard of ordinary care is not applicable to him.

299 The standard with reference to him is he owes the duty to refrain from wantonly or wilfully causing Michael harm, and he owes the duty of not exposing Michael to hidden perils or dangers which Michael could not avoid by reasonable care on his own part.

And he had the duty of maintaining the area of the construction work in a condition which would not unnecessarily or unreasonably expose Michael to danger.

Now, wilful or wanton conduct is conduct characterized by recklessness or disregard for the rights of others and when I referred to negligence on the part of Mr. McAlister, I meant it in the sense of this definition.

That is, you are to determine whether or not he violated his duty, as I have explained his duty to you, and it is only if he had violated the particular duty that I have described to you that he would be guilty of negligence in this case.

You may now retire.

* * * *

3

Elsie R. Marcley

* * * *

54 BY MR. DOHERTY:

Q Were you familiar with these school grounds before this incident occurred? A Yes.

Q Had you been in there? A Yes.

Q And had you been in there since they started the erection of this wing through the Somerset School? A I don't remember being in there after that had started.

Q But you knew when it started? A I knew about two weeks before school was out that year that construction was beginning and that the wing was to be built.

* * * *

68

Lyne S. Smith

* * * *

77 BY MR. BERLOW:

Q Now, Lyne, do you remember when Michael Marcley was hurt? A Yes.

78 Q Now, would you show us on that diagram where you were playing at that time? A Well, we were playing right in this area here (indicating). We came up a ladder up here and around the platform.

Q I can't hear you. A We came up a ladder here (indicating) and then they walked around some platforms that were here (indicating), and he was throwing a saw horse across from one platform to the other and he fell right about here.

Q Where are the steps?

THE COURT: Just a minute.

I didn't hear anything or most of that answer. Will you read it, please, Mr. Reporter?

THE REPORTER: (reading)

"A We came up a ladder here (indicating) and then they walked around some platforms that were here (indicating), and he was throwing a saw horse across from one platform to another and he fell right about here."

BY MR. BERLOW:

Q Would you point out where he fell? A Right about here (indicating).

Q Where are the steps leading to the equipment that you referred to? A They are right here (indicating).

Q Was there any fence separating the equipment or any barricade of any sort? A I don't think so.

Q Do you recall any barricades at all in that area? A No.

Q Was there a barricade—your answer is you recall no barricades then? A Yes.

* * * *

90 BY MR. BERLOW:

Q On June 23rd, Lyne, when Michael was injured, did you observe him climbing a ladder? A Yes.

Q And did you climb a ladder? A Yes.

Q Was there—

THE COURT: (interposing) Where was it located?

THE WITNESS: Well, I can point it out on the diagram, if you want. It was on the north side, north side of the building, against where that fence is.

It was—

THE COURT: (interposing) Suppose you go down there and point out where it was.

(The witness went to the blackboard.)

THE COURT: You might mark it with pen and ink.

THE WITNESS: It was right about here (indicating).

91 THE COURT: All right. You come back now. (Thereupon the witness resumed the witness stand.)

BY MR. BERLOW:

Q Lyne, do you remember who was the first to go up the ladder? A No, I don't.

Q As you were on the ground and looked up, did you see anything resting or on the brick work that was there? Did you see any object? A What do you mean?

Q Well, before you climbed up, did you climb to go and get something or just to play around up there? A Just to play around, explore.

THE COURT: I suggest that you stand here unless you are going to look at the picture, because she drops her voice every time you get on the side.

BY MR. BERLOW:

Q Did you see the other two children climb the ladder? A Yes.

Q And that picture which you are holding in your hand, does that—is there any difference between the ladder that appears in that picture and the ladder which you climbed? A Not that I can see.

MR. BERLOW: I offer that in evidence, your Honor.

92 THE COURT: Now, in this picture the platform that is shown, is that a part of the platform where you climbed up or not?

THE WITNESS: Well, we climbed up to this, I think it was the second platform, and—

THE COURT: (interposing) Well, is that the first or second or some other platform?

THE WITNESS: It is the same platform. You see, we climbed up like—I think we started walking around at the second one and walked around like I pointed out in the diagram.

THE COURT: Is that the area where you went up or some other area?

THE WITNESS: That is the area where we went up.

THE COURT: Very well. It is admitted.

BY MR. BERLOW:

Q Now, when you got to where the ladder ended, was there some object up there that you or any of the other children decided to play with? A I don't think so.

Q Well, you referred, Lyne, to a horse earlier. Was that— A (interposing) Yes.

Q (continuing) Was that there when you arrived at the top of the ladder? A It wasn't on that platform. It was on I don't know what platform. I can't remember. It was on one of those platforms.

Q It was already up there? A Yes.

Q And as you stood on the ground and looked up, were there any floors in this building? A No, there weren't.

Q Was there a second floor in this building? A I don't think so. Just platforms.

Q Was it light at the time that this occurred? A You mean, daylight?

Q Yes. A Yes.

Q Did you have any difficulty in seeing anything? A No.

* * * *

99 BY MR. BERLOW:

Q Was there any barricade or fence between the ladder and the jungle jim? A Well, there's a wall of the building.

THE COURT: Wall of the building?

THE WITNESS: I think so, yes.

BY MR. BERLOW:

Q Were there openings in the wall? A Yes.

Q Was there a place for doors, is that what you mean? A Doors and windows.

Q Now, in that same picture that you have in your hand, Lyne, there are some other metal objects on the playground.

Would you tell me what they are, one at a time? A Well, this one over here (indicating) are just bars you chin and do somersaults and stuff on.

THE COURT: Now, when you identify that, before you leave it, that is on the right hand side of the picture?

THE WITNESS: Yes.

* * * *

100 BY MR. BERLOW:

Q Now, is there any other playground equipment on that picture? A On the left side there is a giant stride. This is the smaller of the—

Q (interposing) Is there more than one giant stride? A There is just one in this picture, but there are two.

Q What do you do on a giant stride? A Well, you grab ahold of these ropes and you run around and hang on to the rope and you just go.

THE COURT: Was that there at the time of the accident?

THE WITNESS: Yes.

BY MR. BERLOW:

Q Now, you see those steps back there (indicating), Lyne, were they there at the time Michael was injured?

A Well, there is an older set of steps. These were just put in. They were put in, I think, in about the sixth grade.

Q There were some steps there though, weren't there? A Yes.

* * * *

102

Cross-Examination

BY MR. DOHERTY:

Q Lyne, when did this work start? You said you thought around April of 1950, it was? A Yes.

Q About a couple of months before school was let out? A I guess so. I'm not sure of that.

Q But approximately that? A Yes.

Q And at the time that the work started, as I understand it, this is the playground over here (indicating) and this jungle jim and all that that you speak about in these pictures were about in this same spot that they are in this picture? A Yes, about.

Q About the same place.

Now, when this work was commenced did anyone in school say anything to you and to the other students in the school about going back where the construction was?

A No.

103 Q Nothing was ever said to you at all? A No, except from my mother and father.

Q They told you not to go there? A Yes.

Q And your teacher never said anything to you? A No.

Q Mrs. Bricker never said anything to you? A No.

Q And during the recess periods weren't the children marched out of the door here (indicating) and taken around to go around that playground so none of them would go up in there around where the construction was?

A They came out of all the doors, as far as I remember, any which one they were nearest to.

Q And you weren't directed at all to stay away from the construction? A No, I don't think so.

Q Then do you remember—this happened now, of course, in June of 1950.

Do you remember, as you have testified here, definitely that that ladder was up there at that time? A Yes.

Q There is no question about that in your mind at all, is there? A No.

104 Q Did you—strike that.

Isn't it a fact that you and these two boys got to this second floor where there were just boards across where the bricklayers were working— A (interposing) The platforms—

Q (continuing) by jumping up on various platforms or pulling yourselves up by ropes? A No. We went up on the ladder and then they are all placed together. There is only that one opening and that's where he fell.

Q Lyne, have you talked to anybody about this case recently? A With my lawyer.

Q What? A I mean, with his lawyer.

Q And who is that? A Well, I think it was once, some Sunday. I think it was about two or three weeks ago, and then he came over Sunday for about a half hour.

Q Now, at the time that this incident occurred, did you give a statement to Mrs. Dooley or to Mr. Dooley or to somebody telling them what happened? A Well, I went over to Mr. Dooley's house right after the accident, but I don't remember what we talked about.

Q You don't remember talking about that at all
105 at the time, telling them how it happened? A I don't remember anything we talked about.

Q Do you know whether you gave them a signed statement or not? A I can't remember.

Q Now, Lyne,—is it Lyne or Lene— A (interposing) Lyne.

Q (continuing) that they call you? Lyne.

MR. DOHERTY: Will you mark this as Defendant's Exhibit No. 1 for identification?

(Thereupon a paper writing was marked by the Clerk of the Court "Defendant's Exhibit No. 1 for identification".)

THE CLERK OF THE COURT: Defendant's exhibit No. 1 for identification.

MR. BERLOW: May I see that?

MR. DOHERTY: Just a minute.

BY MR. DOHERTY:

Q I show you this Defendant's Exhibit No. 1 for identification which is composed of three pages and ask

you if you remember seeing that and whether that is your signature on that paper? A I don't know if this is my signature. It probably was but my writing has changed since that. So I can't be sure.

Q Well, do you remember telling somebody
106 about how this incident occurring and signing your name to it? A I don't remember signing anything or anything, but I'm not sure. I remember—as I seem to remember Mr. Dooley and Billy and I and Dad talked about it, but I'm not real sure.

Q Well now, I will show you page one.

There is a little change or something in there, and there is LSS.

Isn't that your— A (interposing) Those are my initials.

Q And did you put those there? A I don't know. I can't remember.

Q Well now, on this second page there is a notation here where a certain part is crossed out, and there is LSS there again.

Isn't that your— A (interposing) It's my initials, but I am not sure if I wrote them there.

Q Would you say you wouldn't—that you didn't, rather? A No, because I am not sure.

Q And you wouldn't say that you didn't sign this paper here on the third page? A No.

(Thereupon Mr. Doherty submitted the above mentioned paper writing to Mr. Berlow.)

MR. DOHERTY: I am not going to offer it.
107 I am going to ask this lady these questions, this young girl.

* * * *

Q Lyne, I will ask you, in April of 1951 were you at Somerset, Maryland? Is that where you were living?
A Yes.

Q And I will ask you whether or not you were

eleven years old at that time? A I was just eleven.

Q Here is a statement of Lyne Smith, age eleven, birthday June 7th.

Is that right? A Yes.

108 Q 508 Warwick Place and student at Somerset School, sixth grade last summer. A It was fifth grade, I think.

Q Well now, this is 1951. A Oh.

Q This is April 10th, 1951. A Well, I graduated in 1951, between—

Q (interposing) From the sixth grade, or the fifth grade? A Sixth grade.

Q (reading)

“* * * Last summer—I don’t remember when”—

THE COURT: (interposing) Well now, Mr. Doherty, the Court has ruled that you may question this witness in the usual way.

The usual way is to call attention to the specific statement, not to get up and read.

MR. DOHERTY: Well, all right. I will be glad to do that in that way, if your Honor please.

BY MR. DOHERTY:

Q I will ask you whether or not in this statement that you gave on April 10, 1951, you made the following statement:

(reading)

“Mrs. Bricker had sent a notice around and my teacher had told us that we were not supposed to play
109 in this wing.”

Now, here is the part—

MR. BERLOW: (interposing) I object to any reading further, your Honor, and I think that—

MR. DOHERTY: (interposing) I am just going to ask her if she didn’t make that statement.

THE WITNESS: I don’t think I did.

THE COURT: Just a moment.

The witness has testified that she was not told anything about it. Now, you may ask her if she didn't on a certain date state thus and so.

MR. DOHERTY: All right. That is what I was just asking. I just asked that question.

BY MR. DOHERTY:

Q I will ask you again whether or not on April 10, 1951, you didn't make this statement:

(reading)

"Mrs. Bricker had sent a notice around and my teacher had told us that we were not supposed to play in this wing."

THE COURT: Now, just a minute.

BY MR. DOHERTY:

Q Now, I want to ask you whether or not you didn't make that statement? A I don't think I did.

110 Q Well now, I referred a few moments ago to these LSSs which is right along side of that.

Don't you remember this paper at all? A No, I don't remember any of that. I know I was over at Mr. Dooley's, but I thought that was right after the accident.

Q Well now, this was at your home on—and was your mother present at the time this man came to see you and talk to you? A I don't know.

Q But you do remember this LSS (indicating)? A I don't remember any of it, but it could have—

Q (interposing) But that is your— A (interposing) Those are my initials.

Q And it is right along side this notation, "Mrs. Bricker had sent a notice around and my teacher had told us that we were not supposed to play in this wing"? A Yes.

Q But you say now even—does that refresh your recollection as to whether or not Mrs. Bricker had ever sent around word to you? A No.

Q It doesn't?

MR. BERLOW: I object to any further reading, if your Honor please.

111 MR. DOHERTY: I am not reading. I am going to read something else, if your Honor please, not that again.

There are other things in here.

MR. BERLOW: She says she remembers nothing connected with the statement. She was eleven years old. I don't see how this can be helpful at all.

MR. DOHERTY: I am going to something else.

BY MR. DOHERTY:

Q Do you remember what time of day this was? A In the afternoon.

Q Was it after the men had gone home from work? A Yes.

Q What was Michael and this other boy, Billy, doing in the place? A In the construction, you mean?

Q Yes. A Just exploring around.

THE COURT: Speak just a little louder. It is hard to hear you even from where I am sitting.

BY MR. DOHERTY:

Q What were they doing? A He was exploring, following the platform.

Q Weren't they throwing bricks around and all that up there? A I don't think so.

112 Q Well, you were there, weren't you, Lyne? A Yes.

Q I ask you again whether on April 10, 1951, you didn't make this statement:

MR. BERLOW: Your Honor, I object. She said she doesn't remember anything connected with that statement. I don't see any point in pursuing it further.

THE COURT: Well, you may call her attention to something specific if it contradicts or you think it contradicts what she now says, but I don't think that you have a right to read a paper and—

MR. DOHERTY: I am not going to. Your Honor told me in the beginning not to do that, but I was only going to lead up to show something.

But now I am just going to specifically ask her and I don't have to be told two or three times.

BY MR. DOHERTY:

Q Didn't you make this statement:

(reading)

"They were throwing bricks, cinders, and stones at a sawhorse on the ground."

A I don't remember.

Q You don't remember making that statement at all?

A No, I don't remember any of it.

Q What was Mike doing at the time that he
113 fell? A He was trying to throw a sawhorse from one platform to another.

Q From what? A One platform to the other.

Q And what occurred? What happened to him? A Well, I guess the weight of the sawhorse pulled him over.

Q Was he going to throw that from the second floor to the ground? A No. He was just throwing it from one platform to the other.

Q On April 10, 1951, didn't you make this statement:

MR. BERLOW: I object to this, your Honor. Unless he produces the man who wrote that down, I don't think he is entitled to read any of it.

MR. DOHERTY: I certainly can. I can get the man when it becomes necessary.

MR. BERLOW: The child has already testified that she doesn't remember a thing connected with that statement. She is a child now. She was a child then.

I don't see how she can be expected to—

MR. DOHERTY: (interposing) She has remembered everything else that happened over there according to you. She is your witness.

THE COURT: Well, you may ask her a question, but you may not read from a paper.

MR. DOHERTY: I don't understand your Honor's ruling now.

THE COURT: Well, you are undertaking to read from a paper. The Court has ruled that you may ask her if she did not on such and such a date, state such and such, if you deem it contrary to what she has testified to.

MR. DOHERTY: Yes.

THE COURT: But—

BY MR. DOHERTY:

Q (interposing) Didn't you on that day state: (reading)

"Then Mike decided to throw a sawhorse down from this second floor level to the ground."

A I don't remember. The second floor?

Q And when he fell was he still holding on to the sawhorse? A I don't think so. It would be kind of hard to hold on—

Q (interposing) What did you say? A It would be kind of hard to hold on to one when you are falling.

THE COURT: She has already testified that she didn't see him after he fell. From the previous testimony, she didn't see him fall on the ground.

That is my recollection. It is the jury's recollection that will govern the jury.

BY MR. DOHERTY:

Q Did you make this statement:

MR. BERLOW: If your Honor please, can I make my position clear? I will withdraw my objection to this reading if he will produce the man who wrote that down.

Now, if he will tell me he will produce him, I will make no further objections.

THE COURT: Now, you may on cross-examination—I mean, on redirect examination ask any questions you

like about who wrote it, and the circumstances that she can remember.

She doesn't remember any of it.

BY MR. DOHERTY:

Q Didn't you make this statement:
(reading)

"Mike picked up the sawhorse and tried to throw it over to our platform. He maybe didn't let go soon enough, and he fell off, still holding the sawhorse. As he fell, he let go of it."

THE COURT: Now, just a moment. That isn't for the purpose—you are reading a lot there. It is only the particular statement that she has testified to that you are permitted to ask the impeaching questions on.

BY MR. DOHERTY:

Q I will ask you whether or not on that day
116 you made this statement:
(reading)

"We reached the second floor by climbing a line of about three platforms or by pulling ourself up on a rope."

A I don't remember. I know we climbed up on a ladder though.

Q You do know that? A Yes.

Q Now, I will ask you whether or not you didn't make this statement over your signature:

(reading)

"Sometimes there was a ladder but I think it had been taken down by the workmen that day."

Do you remember making that statement? A I don't remember. I am pretty sure I didn't though.

Q You are sure you didn't make that statement? A Yes. One thing, I was too little to pull myself up on a rope on three platforms.

Q But you would chin yourself out here on the play-

ground, wouldn't you? A Those were bars and they weren't very high.

Q Do you remember very distinctly about a ladder being on the outside and you so testified in your
117 direct examination, didn't you? A It was on the inside of the building.

Q It was on the inside? A (The witness nodded affirmatively.)

Q The ladder wasn't on the outside? A No.

Q Well, you identified a picture and said that the ladder was in about that same place? A Well, that was taken from inside. You can see the trees through the window.

Q What's that? A By the, by the window of the picture.

Q This ladder wasn't on the outside that was shown to you? A No.

Q I am wondering then—tell me if I am wrong—that the ladder was on the inside, although it looks like the outside to me.

But you remember those things very well, but you don't remember ever talking to anybody about giving a statement like this? A Mr. Dooley.

Q Well, do you remember making a statement to this man that you were giving a statement to Mr. Dooley?

Let me ask you this: If you didn't in this statement that you gave to this gentleman make this statement:

118 (reading)

“* * * I went to the Dooley's and told them how the accident occurred. I don't know if it was written down.”

Do you remember making that statement on April the 10th? A I don't remember any of that. You—I don't know. I was over at the Dooley's.

Q But you did go to the Dooley's? A Yes.

Q You don't remember making this statement to somebody else, that you had given a statement to the Dooley's?
No.

Q When did you make the statement to the Dooley's?
A I think it was pretty soon, right after the accident.

Q That night? A I don't think it was that night, no.

Q Was it a few days afterward? A I can't remember.

Q You can't remember whether it was in writing or not? A No.

* * * *

119 Q Was your mother present when you talked to someone about this? A My father was, not my mother.

Q Your mother wasn't? A No.

120 Q Your father was there? A When we were over to the Dooley's just my father and I went.

Q I didn't hear you. A I said, when we were over to the Dooley's just my father and I went.

Q No, I mean at a later time in April.

Do you remember your mother or father being present? A They probably were.

THE COURT: Well now, he didn't ask you whether they probably were. He wanted to know if you remember their being there.

THE WITNESS: I don't remember.

MR. BERLOW: I would like the record—

BY MR. DOHERTY:

Q (interposing) What did you mean in your answer to Mr. Berlow's question about who Mr. Dodge was, that perhaps your mother knew about it? A She might have. I don't remember the name at all.

Q What? A No.

Q You don't remember a man coming there at all and talking to you about this accident about eight or nine or

ten months after this incident occurred, and your—some
member of your family was there? A I am not
121 sure.

MR. DOHERTY: All right. That's all.

* * * *

122 *Catherine R. Dooley*

* * * *

131 Q Do you recall that there came a time when
additions were being put on the school building?

A Did I what?

Q Do you recall that there was a time when they
began to enlarge the school building? A Yes, I do.

Q Do you remember when that work began approxi-
mately? A You mean, the month or the year or what?

Q Well, how soon—how much prior to June of 1950,
had that work been in progress, for how long a
132 period of time? A I would say two or three
months. That's guessing.

* * * *

154 Q Do you know when this construction work
started actually? A I do not.

Q You can't say whether it was a month or two
months before this incident occurred? A It seems to
me it was several months. I couldn't say for sure.

Q But when you went over there that day you could
see that there was a little timber around there and this
building was in construction— A (interposing) Yes,
I could.

Q (continuing) and up to the second floor? A Yes,
I could.

* * * *

156 *Billy Dooley*

* * * *

163 Q Do you remember the day that Michael was hurt? A No, I don't know which day.

Q Well, what were you doing on the day that Michael was hurt? What were you and he doing? A At first we went over there and Mike and I and Lyne was there already, and she was playing by herself. She was just on her way to—

THE COURT: (interposing) Speak just a little louder.

THE WITNESS: And we would meet and go up on the building by the ladder and play around.

BY MR. BERLOW:

Q Was there anybody there except for you and Lyne and Mike? A I don't remember that.

Q You don't remember anybody else being there? A No, I don't.

Q Now, when you were by that ladder what did you do next? Do you remember? A Played around and dropped bricks and stuff on the ground, and I don't remember anything else we did. I just remember playing on one, one—just a few things.

Q Anybody come up—any big man come out
164 and chase you away? A No, they didn't. There wasn't any man there.

Q Did you finally climb the ladder, Billy? A Well, I don't know who's first and finally.

Q Did anyone of you, kids—

THE COURT: (interposing) Just a moment.

MR. DOHERTY: I didn't hear that last answer.

MR. BERLOW: He says he doesn't know who was first.

THE COURT: Read the question and answer, please, Mr. Reporter.

THE REPORTER: (reading)

"Q Did you finally climb the ladder, Billy? A Well, I don't know who's first and finally."

BY MR. BERLOW:

Q Well, did one of you climb up the ladder at that time, Billy? A Yes. I don't know really who was first. One of us did.

Q But did you all climb up the ladder then? A Yes. We all—not at once though.

Q One right after the other? A One right after the other.

Q And what did you do when you got up to the top? A Well, a few bricks and stuff around and a sawhorse.

165 Q Where was the sawhorse, Billy? A The sawhorse? Well, I don't remember that.

Q You don't remember.

Was it up on top? A Oh, yes, it was on top.

Q You didn't carry it up there, did you? A No, I didn't. It was already up there.

* * * *

170

Cross Examination

BY MR. DOHERTY:

Q Billy, where were you going to school at the time that Mike fell? A Somerset School.

Q Were you going there to school? What grade were you in? A I don't remember that.

Q And had any of your teachers told you that you shouldn't play out there in that yard? A No, they didn't.

Q Nobody ever said anything like that to you in the classroom? A No.

Q Are you sure of that? A Sure.

Q Do you know Mrs. Bricker? A Yes, I do. Principal.

Q And neither she nor your teacher ever told you to stay away from this construction work? A Well, if she did I don't remember.

Q Now, Billy, on this day how long would you say you were over there playing up on this construction work before Mike fell? A I don't know that.

171 Q Approximately? A About some like a half hour.

Q Now, was Lyne Smith over playing at your house at all? Did she go over with you? A She came over a few times.

Q Well, that particular day was she over at your house? A No, she wasn't.

Q And you were over there, how long would you say that you were on the second floor of the place where Mike fell from?

MR. BERLOW: I object to this, your Honor. There is no second floor there.

MR. DOHERTY: Well, —

MR. BERLOW: (interposing) I think he ought to rephrase that question.

MR. DOHERTY: Well, you come in on the ground floor. I am not trying to get him confused at all. I am a little bit, but I am not trying to confuse him.

BY MR. DOHERTY:

Q There is a ground floor there, isn't it? A Yes, cement.

Q Cement. That is the first floor and then you went there to some other floor, didn't you, or— A (interposing) No, there wasn't—

Q (interposing) What? A There were saw-
172 horses with boards on top of them, three stories of them.

Q Three stories of them? A And that's what we were on.

Q But there were really no floor up there, but there were boards on what would be the second floor or third. Is that right? A Yes, boards on sawhorses.

Q Which one of those floors did you get on, the sec-

ond one up or the third? A The top one, the third.

Q On the top floor and there were just boards around there and a lot of bricks and things like that? A Yes, rubbish and stuff.

Q And there were some bricks there too, weren't there? A Right.

Q Before Michael fell what were you doing up there? A Playing around and just playing around on top.

Q Weren't you throwing some bricks around too? A Well, yes, just a few.

Q You threw those down to the lower floors? A Not in the rubbish pile. We were throwing them some place.

Q Throwing them off of that third floor or whatever floor it was? A Yes, that's right.

173 Q How long would you say you were up there playing around on the top? A Before Mike fell?

Q Yes. A About ten minutes because we were all around the building.

Q Now, when Mike finally made up his mind to get some sawhorse—it is a wooden sawhorse, isn't it? A That's right.

Q And did you—were you right near him when he fell? A Well, I wasn't right there. I was on the other side of it.

Q And what was he trying to do with it? A He's trying to throw it across to my side.

Q And where was your side in relation to where he was?

Were you down lower? A No, I was on—I was on the same floor except I wasn't down lower, no.

Q You were on the same floor with Michael, and he was— A (interposing) Yes, I was.

Q And he was trying to throw a sawhorse over to you? A Yes.

Q They were rather big, weren't they? A No, not

too big. The ones that the sawhorses—that held up the
boards that we were standing on, it wasn't that
174 size. It was a smaller one.

Q A smaller one.

And what happened as he started to throw that across
to you? A Well, the weight of it pulled him down.

Q Well, it was rather heavy.

Is that right? A Yes, it was. He didn't know it.

Q What? A He didn't know it because first time he
picked it up.

Q That was the first time he picked up one of those
sawhorses? A That's right, one of those.

Q Hadn't he thrown any of those off before that?
A No.

Q Just bricks and other things, is that right? A Yes.

Q Did he throw any boards? A Some what?

Q Boards, planks? A No, he didn't. No, he didn't.

Q Never threw any of those down? A No.

Q Now, Billy, about getting up to this place. You
say there is a place.

175 Wasn't it sort of a platform like you pushed—
strike that.

Let me ask you this:

Were you ever there and saw them working during the
day when they were pushing bricks up to bring them up?

A Yes, they was. There was an elevator there and they
put bricks on it and they came up with the bricks and
let them off at the top.

Q Well, wasn't there a board, a sort of a board floor
that went around and sort of platform that people could
walk up to the second and third floors, a made platform
out of boards? A I don't remember.

Q Wasn't that what you went up on that day? A
Yes. A ladder we went up.

THE COURT: Would you read that last answer?

THE REPORTER: (reading)

"A Yes. A ladder we went up."

BY MR. DOHERTY:

Q I show you Plaintiffs' Exhibit No. 4a for identification and I will show you, this (indicating) is sort of a plank walking here.

Do you see what I mean? A Yes, I see now.

Q Now, weren't there some, most of those
176 there that you could walk around on and go up into the second and third floors? A I don't know. I don't remember.

Q Can you describe that ladder a little more fully that you said you used to go up on the, up to this higher floor or to the higher levels? A Well, it was thick boards so that we climbed on the rungs with thick boards, about this thick (indicating).

Q Was it straight up or was it something that you walk around? A It was leaning up, leaning up like a regular ladder would lean.

Q And was that on the inside of the building or on the outside? A The inside.

Q Had the workmen all left that night? A Yes, they did. We always went over after they left.

Q Do you know what you were doing before you went over there that evening to play? A I don't.

Q Had you changed your clothes from school clothes—
A (interposing) Yes.

Q (continuing) to play clothes? A No, I hadn't.

Q You still had on your good school clothes?
177 A Well, they weren't good clothes. They were just regular.

Q You went to school and played in them too.

Is that right? A Yes, that's right.

Q Billy, how long had you been going over after the workmen left to play in this building? A Since it started being built.

Q And you go over there every night? A Just about.

Q And both Mike and you would go over and play?

A That's right. Sometimes Lyne wouldn't be over there.

Q And how long would you stay there on each occasion? A What?

Q How long would you stay over there?

Would you stay there from the time you left school until Mike had to go home or how long? A No. I don't know how long, about an hour, just as I said.

Q About an hour? A (The witness nodded affirmatively.)

Q And you did that every night since the construction work had started? A Yes—not every night.

178 Q What is that? A Not every night.

Q About how many nights would you say a week, every other night? A Four out of five.

Q Four out of five? A Four out of five.

Q And had you ever been up on this high third floor or whatever the highest level is where Mike fell? A Yes.

Q You had been up there before? A Sure.

Q And that is at night after the workmen left? A That's right.

Q And had you thrown anything from the third floor?

A Yes, I have, a few.

Q Threw boards and things? A Not boards.

Q What would you throw? A A few bricks.

Q What? A A few bricks.

Q You didn't throw them at each other, did you? A Not very many other things.

Q What? A Not many other things.

179 Q Were there any of these wheel barrows up on top there on the third floor? A I don't remember.

Q You know what a wheel barrow is? A Yes, I know.

Q Billy, where did Lyne Smith live? A She lived on Warwick Place.

Q What? A She lived on a street named "Warwick Place".

Q And she played with you practically every night too? A Practically every night.

Q And would she throw these things like you, too? A Well, she would throw a few.

Q And did your mother ever come over there and get you out? A No, she didn't.

Q How would you know when to go home? A We just went home when we wanted.

Q And no one ever told you never to play in that building? A No one, no.

* * * *

181 *Michael D. Marcley*

* * * *

186 *Cross Examination*

BY MR. DOHERTY:

* * * *

187 Q Now, prior to the time of this fall, had you been going up into this building— A (interposing) Yes.

Q (continuing) that was under construction?

And did your mother know you were up there playing?

A Yes.

Q And did Mrs. Dooley know about it too? A Yes.

Q And she knew that you and Billy were playing up there in the construction work? A Yes.

Q Now, Mike, you say, "I don't remember anything about that particular day".

You remember how you got up on to this third floor?

A By a ladder.

Q How do you happen to remember that so well and not remember these other things? A Well,
188 I don't know. I just remember it sort of.

Q Have these matters been discussed quite freely recently? A No.

Q When I took your deposition back in October of 1951 you remember at that time that there was a ladder there and you went up there.

And you had no trouble remembering that, did you?
A No.

Q That was just some time before you fell, wasn't it?
A Yes.

Q Do you know how long you were over there that day? A No, I don't.

Q Any idea at all? A No.

Q And when you used to go over there nights prior to that time—and usually it was after the workmen left?
A Yes, it was.

Q And how long would you play over there? A Not very long.

Q At night? A I mean,—

Q (interposing) What? A About an hour, I guess.

Q And did you always use a ladder to get up
189 onto the higher levels? A Yes.

Q Were they the sort of places where you could walk up gradually that were made together there by the workmen, like you push a wheel barrow up? A I can't remember any.

Q Don't remember that?

Now that fall did you miss many days from school?
A I can't remember.

Q Don't remember whether you lost many days or not? A No, I don't.

Q Remember when you came to my office, Michael?
A Yes.

Q To have your deposition taken? That was on October 13th, 1951.

By the way, this ladder that you speak about, was it on the inside or outside of the building? A It was on the inside.

* * * *

219

Horace O. McAlister

was called as a witness for and on behalf of the Defendant, and being then and there duly sworn by the Clerk of the Court, assumed the witness stand and testified as follows:

Direct Examination

BY MR. DOHERTY:

Q Mr. McAlister, now you keep your voice up so we can all hear you.

What is your full name? A Horace O. McAlister.

Q And where do you live? A Now I live at 507 Archer Way, Colesville, Maryland.

Q And what business are you in? A I am in the general contracting business.

Q And directing your attention to June of 1950, were you in that business then? A I was.

Q And what were you constructing—were you constructing an addition to the Somerset School in Bethesda, Maryland? A I was.

Q And where is that school? A You mean the streets? It is Drummond Avenue—it is in a—three streets: Drummond Avenue, Cumberland Street and Warwick Street, I think.

220 Q And you started—do you remember when you started working there? A Sometime around the first of May, 1950.

Q Now, prior to the time that you were commencing work did you have any conversation with the superin-

tendent of the school? A The Superintendent of Schools?

Q Yes. Mrs. Bricker, was she the superintendent of the school? A Yes, yes. She was principal or superintendent of the school.

Q And did you say anything to her about the children? A Yes.

MR. BERLOW: I object to what he said to Mrs. Bricker, your Honor.

THE COURT: The objection is sustained.

MR. DOHERTY: All right.

BY MR. DOHERTY:

Q Now, will you come down here?

(Thereupon the witness went to the blackboard.)

Talk out loud so everybody can hear you.

Mr. McAlister, did you put any fence up of any kind when you started construction on this particular job?

A Yes, we put fences or barricades up.

Q And where were they put? A Well, we
221 had—we put up movable barricades across this entrance right here (indicating).

Q Why did you put up movable ones? A So that we could take them down to get our trucks around in here (indicating) and also so the garbage truck of the school could come around the side of this building and pick the garbage up right here (indicating).

And also so the coal trucks—now, that didn't happen every day, the coal trucks, but when they did come in, they had to come around here (indicating) to deliver coal.

Q Now, prior to the time that you put the barricades up did the school busses come in there (indicating)?

A Oh, yes, before we started the job, the school busses came up in here (indicating) and turned around.

Q And unloaded? A Not in every case. Sometimes if there was a bus in here unloading (indicating) another bus would stop here (indicating) and that's a walk to the

school, and not in every case but they unloaded there.

Q After you put up the barricades where would the busses stop? A After we erected the barricades the busses would stop down here, on in here (indicating) and most of the time they would go out this way (indicating).

This Warwick Street during school hours was
222 one way; in the morning, coming up; in the afternoon, going down. If—I'm not sure of that. It was one way or the other. It was a one way street.

Q All right. Now, after you commenced this operation for the digging or the starting of the work there, were children permitted to play in any part of this area taken in by your construction going back in through here (indicating)? A No.

* * * *

224 Now, how far would you say it was from the east side of this construction work down to where
225 the playground place was approximately? A Well, this, this addition is a forty foot addition.

Q You mean forty foot wide? A Wide this way (indicating); so taking that same distance down forty—

MR. BERLOW: (interposing) I object to this.

THE WITNESS: (continuing) approximately eighty feet.

THE COURT: What is the objection?

MR. BERLOW: I object to his using the map to determine distances, your Honor. There has been no showing that distances appear on that map accurately.

MR. DOHERTY: Well, I thought you had this—

MR. BERLOW: (interposing) I offer the map but frankly it is just a rough sketch. I think he should estimate it from his own knowledge of the job if he was there every day.

THE WITNESS: Approximately eighty feet.

MR. BERLOW: From where to where—excuse me.

BY MR. DOHERTY:

Q From the east side of the construction work down over to where the playgrounds were?

Now, what is this section here that is darkened off?

A That's a—that was a bank approximately ten feet high sloped off.

Q Sloped down into the playground? A That's right.

229

Cross Examination

BY MR. BERLOW:

* * * *

244 THE COURT: Now, you testified about some barricades that were there.

Could you tell us in general how many there were and where they were placed and what the size of them was?

THE WITNESS: I know the length of them, the height of them, and I don't know how many that it, that it took to go around the job, but the length of them was approximately ten feet long.

They were four feet high and were made up on a T so that you could set them on a pavement like this floor and move them. It would take—two men could move them all right.

THE COURT: And did they have some wood or something—

THE WITNESS: (interposing) They had slats just like a wood fence, like, almost like a white board fence that you see around, only they weren't painted white.

THE COURT: And those slats were they of a size that children could get through?

THE WITNESS: No. They couldn't get through them. They could go over them if they had to. You know kids can find most any place but they couldn't get through them.

THE COURT: And how high did you say they are?

THE WITNESS: Four. As well as I remember they were four feet. I am pretty sure that's right. That's what we normally make them.

245 THE COURT: Do you remember where they were placed?

THE WITNESS: Yes, I know exactly. At that time I know we made them to go—you see, I wasn't on that job in the morning.

Where the men started working they had moved some of the barricades. I know where we made them to go around the construction. I can point that out very very easily.

THE COURT: Well, you might do that on that plat. (Thereupon the witness went to the blackboard.)

THE WITNESS: This area (indicating) being fenced down here and back here we placed a barricade across this. This, some place about this turn, the barricades went back up around the yard.

This is a yard with trees and shrubbery, come up the driveway back the driveway and it would be—one would go in on an angle. Sometimes they didn't always go back just like—they were taken down on this angle because it might get a little longer when you move them.

Then we would have across here and back up to this fence and the rest of the building was—this existing building—fence that side, this fence, that side, and this fence this side.

* * * *

247

Alfred Higgins

was called as a witness for and on behalf of the Defendant, and being then and there duly sworn by the Clerk of the Court, assumed the witness stand and testified as follows:

Direct Examination

BY MR. DOHERTY:

Q Mr. Higgins, keep your voice up now so we will have no difficulty hearing you.

Q Your full name is Alfred Higgins? A That's right.

Q Where do you live? A Damascus, Maryland.

Q And where are you employed? A H. O. McAlister Company.

Q What kind of work do you do? A Carpenter.

Q Now, directing your attention to the 23rd day of June, 1950, who were you working for then? A H. O. McAlister.

Q And where? A Bethesda, Somerset School.

248 Q And they were building an addition to that school? A That's right.

Q What was your work then? What kind of work did you do then? A Carpenter.

Q You were a carpenter then too? A Yes, sir.

Q And in addition to that did you have any other duties on that job? A Yes, sir.

Q What were they? A To look after all the tools after four o'clock and see that all ladders were taken down.

Q And that is the equipment that you had charge of, the equipment? A That's right.

Q And now directing your attention to—you heard about this Michael Marcley falling? A What kind of falling?

Q You remember about Michael Marcley, the boy that fell out there? A I remember about the boy falling. I didn't know the boy, but I remember about it; yes.

Q When did you find out about it? A The next morning after I seen the picture out there—taking
249 pictures.

Q And were the ladders up there that morning when you went to work? A No, sir.

Q Had you taken them down the night before? A That's right.

Q Do you have any idea how many ladders were on the job or did you have— A (interposing) Oh, I wouldn't know right off hand exactly how many. We always kept some three or four around the job.

Q But on the night—and on the night of the 23rd, you did take down the ladders? A That's right. That was my job every day.

* * * *

258

Kathryne M. Bricker

was called as a witness for and on behalf of the Defendant, and being then and there duly sworn by the Clerk of the Court, assumed the witness stand and testified as follows:

Direct Examination

BY MR. DOHERTY:

Q Your full name is Kathryne M. Bricker? A Yes.

Q And that is K-a-t-h-r-y-n-e? A That's right.

Q Keep your voice up, please.

Where do you live? A I live at 4604 Overbrook Road in Brookdale, Maryland.

Q And where are you employed? A I am employed at the Somerset School in Chevy Chase, Maryland.

259 Q And in what capacity? A I am principal of the school.

Q And how long have you been at that school? A Twenty-five years.

Q And were you superintendent of the school, of that school in the spring of 1950? A I was.

Q And did you have an occasion to meet Mr. McAlister, the defendant here, at that time? A I did.

Q And in the spring of 1950 was there an addition started to the Somerset School? A It was.

Q And did you at that time make any statement to the students relative to the use of the ground where the addition was to be placed? A Communications went to the classrooms through—from the principal's office through the teachers asking them to remain away from the north addition.

Q And did you see any obstructions of any kind placed there by Mr. McAlister to show that people weren't to go beyond a certain space? A There were a type of barricade at both ends of the north area where the construction was being made.

Q That is to the entrance to the— A (interposing) There was one at the driveway entrance, which
260 was a movable type of a barricade, as I recall, and on the east side, there was a stationary barricade.

And that is the side that we were most concerned with because our children passed by that barricade.

Q The east side. The addition was on the north side. Is that correct? A That's right.

Q And the east side over here (indicating) was where the children's playground was? A (The witness nodded affirmatively.)

Q And you say there was a barricade of some kind along there (indicating)? A At the corner of the building, yes.

Q I see.

* * * *

261

Cross Examination

BY MR. BERLOW:

* * * *

265 Can you remember the date when the instructions were given?

THE WITNESS: I do not. It was more than one occasion, I am certain.

BY MR. BERLOW:

Q Well, now, I would like—well, there was more than one occasion when work was done on the building. A No, more than one occasion while the north wing was being constructed.

Q Do you know Lyne Smith? A Yes, I do.

Q Do you remember who her teacher was in the year, 1950, in the Somerset School? A No, I do not.

Q Now, you did not actually give the instructions to the students, yourself.

Is that correct? A That's right.

Q You gave them to—the instructions to the teachers who gave them to the pupils? A That's right.

Q Do you recall ever, yourself, telling Lyne Smith, personally, that particular child, not to play in this
266 area? A I do not.

Q Do you recall telling Michael Marley? A No, I do not.

Q Do you recall telling Billy Dooley? A Yes, I do.

Q Prior to the time that Michael was hurt? A Yes, I do.

Q Was he a student in your school? A He was not in that year.

Q Now, after these instructions were given to the teachers, do you recall discussing this matter with Mr. McAlister in any way after that time?

Did you see Mr. McAlister and have a discussion with him about anything? A I don't recall the exact order in which that was done, but I am sure that instructions were given immediately upon the beginning of the work.

Q And then after that? A And Mr. McAlister and I worked out cooperatively, I would say, a provision for the type of barricade that we felt we needed during the school day.

Q But after you gave these instructions to the children did you tell Mr. McAlister it wasn't necessary for

him to use care in protecting the children against this?

A Certainly not.

267 MR. DOHERTY: I certainly object, your Honor. That isn't—

THE COURT: (interposing) The objection is sustained.

BY MR. BERLOW:

Q Was this discussion about the barricades before or after the instructions were given to the teachers to give to the children? A I cannot remember the order in which they were given but I would assume it was about the same time.

Q Did you ever have any discussion at any time with Mr. McAlister about the ladders that were being used on this job? A No.

Q Now, after these instructions were given to the teachers to give to the students, did you actually go to the classrooms while the teachers were giving these instructions and hear the instructions that were given? A I don't recall that I did.

Q And after the teachers were so instructed did you see children playing in that area? A Not during the school day.

Q Did you see them? A I didn't—I beg your pardon. I did not see any of our Somerset School children playing during the school day.

Q But there were children— A (interposing) There were children playing on at least two occasions, I recall.

270 *The Court's Charge to the Jury*

THE COURT: Members of the jury: A person who comes into court and makes a complaint is known as the plaintiff. In this case there are two plaintiffs, Mrs. Marcle, and her minor son, Michael Marcle.

The person against whom a complaint is made is called

the defendant, and in the case before you the defendant is Mr. H. O. McAlister.

It is without dispute that on June 23, 1950, Michael Marcley was injured while on the premises of the Somerset School in Bethesda, Maryland; that it was where construction work was in progress in which the defendant, Mr. McAlister, was engaged; and, that at the time the school had adjourned for the summer and the workmen on the job had finished their work for the day and were not on the scene.

Mrs. Marcley and her son, Michael, are each suing for damages. They say that the defendant was negligent in leaving a ladder on the premises adjacent to playground apparatus without taking precaution to guard against its use by the minor plaintiff or to exclude him from the construction area.

They further say that such negligence was the cause of the injury suffered by Michael. Michael seeks to recover damages for his injuries and for his pain and suffering.

Mrs. Marcley seeks to recover damages for the expenses to which she has been put for hospitalization, nursing and medical attention for Michael and
271 for time lost from her employment.

On the other hand, Mr. McAlister denies any negligence on his part and says he is not liable for damages. He says he did take precautions by means of barricades, by the taking down of ladders at the end of the work day and otherwise.

Further, Mr. McAlister says that whatever injuries Michael suffered were the result of Michael's own negligence or contributory negligence in going in and upon the construction work and in climbing up to the place from which he fell in an effort to move equipment about.

Mr. McAlister also says that Mrs. Marcley was negligent in failing to supervise Michael so as to prevent him from going upon the construction work and climbing up to the place on the second floor level and throwing off a wooden horse, in which exertion he fell.

Moreover, Mr. McAlister says that because of her negligence Mrs. Marcley is not entitled to recover.

Now, it becomes your duty to determine whether the plaintiffs are entitled to recover, and if so, in what amounts. It is the function of the judge to preside at the trial and to pass on questions of law as they arise, and finally, at this stage of the proceeding, to inform you as to the law applicable to the case.

It is the function of the jury to determine the facts.

272 You are the judges of the facts. After you determine the facts for yourselves, you are then to apply to those facts, which you find, the law as given to you by the Judge. You are to base your findings upon the evidence in the case.

The evidence in the case consists of the testimony of the witnesses who have appeared here before you and the exhibits which have been admitted in this case and which have been shown to you or read to you.

Now, what the lawyers say is entitled to your consideration insofar as you find what a lawyer says logical and reasonable and in accord with the evidence, but what the lawyers say in the case is not evidence and if the Judge says anything concerning the evidence, what the Judge says is not evidence.

And it is your recollection of the evidence which is to guide you. It is not the recollection of the lawyers and it is not the recollection of the Judge, but it is your recollection.

If anything has been said or is said that differs from your recollection, then you are to be guided by your recollection.

You are not only the judges of the facts, but you are the judges of the credibility of the witnesses who have appeared here before you. And that means that you are to determine the credit and weight to be given to the testimony of each witness.

In passing upon the credibility of a witness you may take into consideration the demeanor of the witness on the witness stand, whether the witness impressed
273 you as having an accurate memory and recollection, whether the witness impressed you as being a truth telling individual or the contrary.

You may take into consideration the interest of a witness in the outcome of the case. Naturally, Mrs. Marcle and Michael, being plaintiffs, are interested in the outcome of the case. And Mr. McAlister, being the defendant, is also interested in the outcome of the case.

You may also take into consideration the friendship, if any, manifested by a witness for one side or the other. You may take into consideration employment. You may take into consideration any other factors which to your mind would have a bearing on whether the witness had or had not colored his or her testimony in any way.

You may consider the probability or improbability of the testimony of a witness, the reasonableness or unreasonableness of the testimony, bias or prejudice of a witness, if any be manifest.

Also you may take into consideration contradictions, if any, in the testimony of a witness. If you believe that any witness has wilfully testified falsely as to any material matter about which the witness could not reason-

ably be mistaken, then you may disregard the whole of the testimony of such witness or such part of the testimony as you believe to be untrustworthy.

As I have said, the law leaves to your good, sound judgment the credit and weight to be given to the
274 testimony of each witness who appeared here before you.

Now, at the outset you are told that the burden is on the plaintiffs, Mrs. Marcley and Michael, to prove their claims by a fair preponderance of the evidence.

The words "preponderance of the evidence" simply mean that in order that you may find a verdict for the plaintiffs, you must be reasonably satisfied that their allegations are true. This requirement does not mean that the plaintiffs must produce a greater number of witnesses than the defendant, but, as I have stated, it means that you must reasonably be satisfied of the truth of the allegations of the plaintiffs' claims.

Let me state the same thought to you in a somewhat different way.

Preponderance of the evidence means evidence of greater convincing force. The duty of the jury is to weigh the evidence carefully and to find a verdict for the party in whose favor the evidence preponderates or weighs the most.

In this case the plaintiffs have the burden of proving their allegations that Mr. McAlister was negligent and that such negligence was a proximate cause of the injuries received by Michael. If you should find that they have proven those allegations by the greater weight of the evidence, then they would have successfully carried the burden of proof which is upon them.

But if you should find that the evidence is evenly
275 balanced so that it weighs no more on one side
than on the other, or, if you should find that the
evidence weighs the most on the side of Mr. McAlister,
then the plaintiffs would not have successfully carried
the burden of proof which is upon them.

Now, you must weigh and consider this case without
regard to sympathy, prejudice or passion or emotion for
or against any party to this suit.

You are told that the mere fact that an accident hap-
pened, considered alone, does not support an inference
that some party or any party was negligent. In other
words, the mere fact that an accident happened does not
of itself create any liability on the part of the defendant.

The burden is upon the Marcleys to show by the
greater weight of the evidence that Mr. McAlister was
negligent in that he violated some duty which he owed to
the minor plaintiff, Michael Marcley, and that such viola-
tion was the proximate cause of the injury of which
Michael Marcley complains.

Now, what is meant by the proximate cause of an in-
jury? By the proximate cause of an injury is meant that
cause which in natural and continuous sequence, unbroken
by any efficient intervening cause, produces the injury,
and without which it would not have occurred.

It is the efficient cause, the one that necessarily sets in
operation the factors that accomplish the injury.
276 It may operate directly or by putting intervening
agencies into motion.

Now, this is the legal technical definition of proximate
cause. I am going to restate it in simple, everyday
phraseology. The proximate cause of an injury is some
act or omission that causes or contributes to cause injury
and without which the injury would not have occurred.

In other words, if the plaintiff's injury would not have occurred except for a negligent act on the part of the defendant, then the defendant's negligence would be a proximate cause of the injury. Now, several causes may occur to produce an injury and in that case, that is, if two causes combine to produce an injury, why then, each cause is a proximate cause of the injury.

Now, as you know, this is what is commonly called a negligence action. Ordinary negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do actuated by those considerations which ordinarily regulate the conduct of human affairs.

It is the failure to use ordinary care in the management of one's person or property.

Now, the standard that I have just outlined to you is not the standard applicable to Mr. McAlister. What duty was owing by Mr. McAlister to Michael Marcley? Mr. McAlister owed to Michael Marcley the duty to refrain from wantonly or wilfully causing Michael harm, and the duty of not exposing Michael to hidden perils
277 or dangers which Michael could not avoid by reasonable care on his own part.

In general, Mr. McAlister had the duty of maintaining the area of the construction work in a condition which would not unnecessarily or unreasonably expose Michael to danger. Wilful or wanton conduct is conduct characterized by recklessness and disregard for the rights of others.

Now, in this case what do the plaintiffs claim Mr. McAlister did that was a violation of his duty? They ground their claim on a ladder. They say that Mr. McAlister left a ladder on the construction area adjacent to playground apparatus without taking precaution to guard

against its use by Michael or to exclude Michael from that area.

Now, there is a dispute about this ladder. The plaintiffs say, I believe, that it was left standing. The defendant says it was not so left but it was taken down. The plaintiffs say that Michael climbed up the standing ladder to at least one story above ground level.

The defendant says that Michael resorted to other means of attaining that height. The plaintiffs say that no barricades were used. The defendant says that there were barricades, some of which required two men to lift.

It is for you to determine, as I have already indicated, what the facts are. The main question, as you know, is whether there was negligence on the part of Mr.

278 McAlister; that is, whether he violated a duty owing by him to Michael Marcle, a duty which I have already described.

Since this turns on the ladder, you must first determine from the conflicting evidence in this case what the place and situation of the ladder was at the time.

You are told that if to your mind the weight of the evidence show that the ladder as placed and situated was a dangerous instrument and one which would be likely to cause injury to children if left unguarded in its then situation, and you, the jury, further find that Mr. McAlister or his employee or employees created and permitted such situation, and that such was a proximate cause of the injuries the minor plaintiff received, then, you may bring in a verdict for the minor plaintiff unless you find that negligence on his part contributed as a proximate cause of his injuries.

On the other hand, if you find that the ladder as placed and situated was not such as to lead the defend-

ant to anticipate that children would be likely to resort to it or that they would be likely to be injured if they did resort to it; that the ladder as placed and situated was not dangerous in itself, naturally, then the defendant is not liable and in that event it would be your duty to return a verdict for the defendant, Mr. McAlister.

Even if you believe that Mr. McAlister was negligent, still he is not liable in damages unless his negligence was the proximate cause of the injury. Mr.

279 McAlister says that Michael's act in seizing a wooden horse on a second floor landing and attempting to throw it off or push it around and getting himself thrown to the ground in the process was an act that he, McAlister, could not be expected to have foreseen or anticipated from Michael's use of the ladder, if he did use a ladder.

In short, McAlister says the ladder was not the proximate cause of Michael's injuries.

You are told that negligence is the proximate cause of an injury only when that injury is the natural and probable result of such negligence, and when in the light of the attending circumstances the injury ought to have been foreseen by a person of ordinary care and prudence.

Now, in this case Mr. McAlister says that Michael Marcle was contributorily negligent. Now, what does "contributory negligence" mean?

Contributory negligence is the negligence on the part of a person injured which combining in some degree with the negligence of another helps in proximately causing the injury of which the injured person complains.

You are told that one who is guilty of contributory negligence may not recover from another for the injury suffered. Mr. McAlister has the burden of proof as to

his charge of contributory negligence on the part of Michael.

In other words, he must establish the charge by
280 the greater weight of the evidence, otherwise he
will not have successfully met this burden of
proof.

It is my recollection of the evidence that the testimony was that at the time of the accident Michael's age was between nine and ten years old. Of course, as I have said, it is your recollection which is to govern you, but that, as I have said, is mine as to his age.

A child is not held to the same standard of conduct as an adult and is only required to exercise that degree of care for his own safety which ordinarily is exercised by children of like age, mental capacity and experience. There is no precise age at which, as a matter of law, a child comes to be held accountable for his actions by the same standard as applied to an adult.

It is for you, the jury, to determine the mental capacity and experience of Michael Marcley and whether his conduct was or was not such as might reasonably have been expected from a child of like age, capacity and experience under the same or similar circumstances.

If you find from the evidence that Michael Marcley exercised as much care for his protection as an ordinarily prudent boy of his age, capacity and experience would have exercised under like circumstances, then he would not be guilty of negligence and may recover damages if he has otherwise established the material allegations of his complaint.

281 On the other hand, if you find by the greater weight of the evidence that Michael Marcley in ascending to the second floor level and in attempting to throw off, push or move a wooden horse on that level,

failed to exercise that care and caution which an ordinarily prudent boy of his age, capacity and experience would have exercised under similar circumstances, then such failure constituted negligence on his part and if such negligence was the only cause of his fall and injuries, or, if such negligence helped in proximately causing his injuries, then he cannot recover and in that event your verdict would be for the defendant.

In connection with the duty of the mother or person entrusted by the mother with the custody of the child, you are told that upon the parent or such custodian devolves the duty to protect children from the consequences of their restless spirit of adventure.

On the question of whether there was contributory negligence on the part of the custodian, you may consider the opportunity of the custodian to know of the construction work and its progress and whether she had such awareness of things and took such precautions in respect of the child, Michael, as a person in the exercise of ordinary care and caution would have observed or exercised under like circumstances concerning the care of a child entrusted to such person.

282 The duty of the parent or custodian is to exercise ordinary and reasonable care and caution to prevent injury. Ordinary and reasonable care and caution is that degree of care and caution which under the circumstances a person of reasonable prudence and discretion would use in caring for a child of the age of Michael. Failure to exercise such care is negligence.

It is for you to decide whether on the facts of this case the defendant, McAlister, should be deemed negligent and if so, whether the negligence was the proximate cause of injury to the minor plaintiff.

If you decide that the defendant, McAlister, was not

negligent or if you decide that although he was negligent, that his negligence was not a proximate cause of the minor plaintiff's injury, then your verdict will be for the defendant, McAlister.

On the other hand, if you determine that the defendant was negligent and that his negligence was a proximate cause of the injury, then the plaintiff is entitled to your verdict unless you should decide that the minor plaintiff, himself, was negligent and that his negligence helped to cause the injury.

If you find that both the plaintiff and the defendant were negligent and that the negligence of each combined to cause the injury, then neither plaintiff can recover.

As I have said, involved in this action and for your consideration are two distinct claims; the one of the child, Michael Marcley, who seeks damages for the alleged injury; the other of his mother, Mrs. Marcley, who
283 seeks compensation for pecuniary detriment alleged to have been suffered by her as a result of the child's injuries.

Because there are two separate claims, you must give attention to certain distinctions in considering the defense of contributory negligence. That defense in this case presents two aspects.

The first has to do with the conduct of the mother relative to her negligence, if any, in permitting the child to get into a position of danger. In other words, the question is: Did the mother use ordinary care in the exercise of her parental duty and, if not, did her negligence in this respect contribute as a proximate cause of the injury?

The second aspect of the defense of contributory negligence has to do with the conduct of the child. Was he negligent under the standard of conduct applicable to

such a child, as stated to you in my instructions, and if so, did that negligence contribute as a proximate cause of the injury?

If you should find that there was negligence on the part of the child which contributed as a proximate cause of his injury, then neither, the mother nor the child, can recover, and this is so even if there was no contributory negligence on the part of the mother.

If you should find that the child was not guilty of such contributory negligence but that the mother was, then the defense of contributory negligence is good as
284 against the mother but is not good against the child and does not constitute a bar to recovery by the child, if he is otherwise entitled to recover.

In other words, if it should appear to you from the evidence in this case that there was negligence on the part of the mother of the child in the manner in which she exercised or failed to exercise her parental duty for his care, such negligence, if any, may not be imputed to the child and shall not constitute a bar to recovery by him.

In other words, he is entitled to recover.

Now, the burden of proving contributory negligence on the part of Mrs. Marcley is upon the defendant, Mr. McAlister, and that burden is to prove the contributory negligence by the weight of the evidence.

The uncontradicted evidence in this case shows that Mrs. Marcley entrusted the care of her child to Mrs. Dooley. You are instructed that if Mrs. Dooley, custodian of Michael, was negligent in the manner in which she exercised or failed to exercise her duty for the care of Michael, and if such negligence helped in proximately causing the injuries to him, then the contributory negligence of Mrs. Dooley, if any, is imputed to the mother

of the child so as to defeat her claim for expenses and any other claims put forth by her in this case.

If your verdict in this case is in favor of the
285 minor plaintiff, then it is your duty to award to him such sum as will fairly and reasonably compensate him for all the damage suffered by him which proximately resulted from the negligence of the defendant.

You will consider in fixing the amount of the award the elements of damage that I am now about to mention: Such sum as will reasonably compensate him for the pain, discomfort and mental anguish suffered by him and proximately resulting from the injury in question, and for such pain and discomfort and mental anguish, if any, as you may find he is reasonably certain to suffer in the future from the same cause.

In fixing the award you may take into consideration what the minor plaintiff's health and physical ability were before the accident and what they are now, the nature and extent of the injuries, whether they are reasonably certain to be permanent, or, if not permanent, the extent of their duration, all to the end of determining the present value of the loss suffered by the minor plaintiff.

You are not to include damages for any future injuries or detriment or losses which although possible are not shown by the evidence to be reasonably likely.

In other words, you are to base your verdict as to future losses not upon conjecture or speculation but only as a preponderance of the evidence shows that there is a
286 reasonable certainty that there will probably be future damage or suffering resulting from the original injury.

If under the Court's instructions you find the plaintiff, Mrs. Marcle, entitled to a verdict you will consider in

fixing the amount of the award for her the elements of damage that I am now about to mention: The reasonable value of the examinations, attention and care by physicians and surgeons reasonably required and actually given in the treatment of Michael and reasonably certain to be required to be given in the future treatment, and including in such care, X-ray pictures reasonably necessary, the reasonable value of the services of nurses whose accommodations and care were reasonably required and actually given in the treatment of Michael Marcley and proximately resulting from the injuries, the reasonable value of the time lost by Mrs. Marcley from her usual employment in giving to Michael Marcley nursing and other reasonably required care following his injuries.

In determining this amount you may consider her earning capacity, her earnings in the manner in which she ordinarily occupied her time before the injury to Michael.

Mrs. Marcley, as you will recall, testified that she customarily paid out money for the care of Michael preceding the injury.

From any sum determined by you as the value of time lost from her employment you should deduct such sum or sums which would equal the amount which she
 287 would have paid to a custodian and for the time in question had there been no loss in time from employment.

Now, in this pleading, which has been filed in court by the plaintiffs, the minor plaintiff claims damages in his complaint in the amount of \$50,000. Mrs. Marcley claims damages in the complaint in the amount of \$2500.

These allegations of damage are only claims and are not evidence and must not be considered by you as evidence of damages, but you may not award Michael any sum larger than the one he claims nor may you award

Mrs. Marcley any sum larger than the sum which she has claimed, which I have stated the same to you.

Now, ladies and gentlemen, when you go to the jury room you will there select your foreman. Your foreman will give each of you an opportunity to present your views. Upon your return to the courtroom your foreman will state your verdicts on these two claims, but each of you individually may be asked what the verdict is.

Now, when you pass out of the jury room I will ask the alternate juror to remain behind and thank him very much for his service in this case. Now, when you get back in the courtroom, the Clerk will ask your foreman if you have arrived at a verdict and the foreman will answer that you have arrived at a verdict or that you have not arrived at a verdict, as the case may be.

288 Then the Clerk will ask you whether you find for the minor plaintiff, Michael Marcley, or for the defendant, H. O. McAlister. The foreman will then answer that you find for the plaintiff or that you find for the defendant, as the case may be.

If you say that you find for the plaintiff, Michael Marcley, you will then be asked in what amount. Then following that the Clerk will ask you whether you find for the plaintiff, Mrs. Marcley, or for the defendant, H. O. McAlister, and the foreman will answer whether you find for this plaintiff or for the defendant. And then if you say that you find for the plaintiff, Mrs. Marcley, you will be asked in what amount.

Your verdict should be unanimous, and let me give you this one parting word.

In considering the instructions you are to consider them in their entirety. You are not to pick out some one and single it out, but you are to consider them all as a whole.

You must approach the issues in this case as practical persons in the same manner in which you would approach any important matter which you have occasion to determine in the course of your everyday life.

Use the same practical approach, the same ordinary common sense and the same practical intelligence in approaching the issues of this case as you would employ in determining any important matter which you have occasion to decide in the course of your own affairs.

Are there any objections or requests? If so, will you come to the Bench?

(Thereupon counsel for the respective parties, the Clerk of the Court and the official reporter approached the Bench, and out of the hearing of the jury the following conference was had with the Court:)

MR. BERLOW: I didn't know, I didn't know that in the complaint she only asked for \$2500, but I think we have proven about \$3,000. So I would like to amend that to make it \$10,000.

THE COURT: Well, I am afraid you are too late now. You have waited until the whole case is over.

MR. BERLOW: I didn't even know it was in there.

THE COURT: It is your responsibility—

MR. DOHERTY: (interposing) That is more than you proved anyway.

MR. BERLOW: What's that?

MR. DOHERTY: I say that is more than you proved anyway, \$2500. You didn't prove \$2500.

MR. BERLOW: About that—

THE COURT: (interposing) In your complaint you only said thirty eight, and you claimed that three hundred which you said her husband paid.

MR. BERLOW: I had never heard that read before. That takes me by surprise, but I would like to amend it to ten.

THE COURT: Well, I am sorry. I can't go down—it is too late now.

MR. BERLOW: Of course. I object to the instruction. Although it was wrong I must say it was well stated.

* * * *

MR. DOHERTY: (interposing) There is another thing. If your Honor please, throughout this whole instruction there was so much said about negligence. It seems almost every other word was negligence on the part of the—

THE COURT: (interposing) How can I cover it?

MR. DOHERTY: I don't know except the facts, the negligence of McAlister and all that, it just seems to come out so much that the jury is almost, in my opinion, the way it sounded to me back there, are being told to find that McAlister is negligence.

I mean it is said so many times, and that is why—that is the only reason I am saying that.

MR. BERLOW: Well, I couldn't—even though I object to the standard I can't conceive of those instructions being better drawn than they were. I don't see how it could be done. I think it was very clear and proper.

Are you going to give further instructions, your Honor? I have no requests except that if there is going to be further instructions I would like to be advised as to what they are.

I don't think any are necessary, myself.

294 MR. DOHERTY: I don't know. Are you going to give any more?

THE COURT: Well, you were talking about the negligence. I tried to make it very clear that in determining the question of negligence with respect to McAlister that that was necessarily to be done in the light of the duty, of what the duties described which he had.

I don't know what I can say.

MR. BERLOW: I don't either.

MR. WALSH: Your Honor, in the beginning of the Charge you defined "negligence".

THE COURT: Yes, but I said he was not liable for that degree—

MR. BERLOW: (interposing) Yes, then she pointed out that he was not liable—

MR. WALSH: (interposing) I know, but then going on the point Mr. Doherty is trying to make, that you have gone on and used this "negligence" repeatedly and repeatedly—

THE COURT: (interposing) Do you want me to still come out again and say—

MR. WALSH: (interposing) Well, I think in the case of a licensee, the term that should be properly used as a matter of law is "gross negligence", not "negligence".

MR. BERLOW: Well,—

MR. WALSH: (interposing) And that is the
295 term that should have been defined to the jury.

MR. BERLOW: I think it is perfectly clear to the jury that Your Honor used the term "negligence" simply as a means of explaining the difference from the degree—

MR. DOHERTY: (interposing) But she didn't say that.

THE COURT: Yes, I did.

MR. DOHERTY: Oh, yes, but then you were talking about contributory negligence.

THE COURT: Of course, that is what I was talking about.

MR. WALSH: For instance, on the Charge on damages your Honor started out to say this: If the negligence of McAlister was the proximate cause insofar as the child was concerned against the proximate cause insofar as the mother was concerned—in other words, "negligence" was repeatedly used after it was defined, and told only once that it was not the duty of the defendant in this case—

MR. DOHERTY: (interposing) You are putting the negligence of the two plaintiffs in the same category as the other.

THE COURT: I see.

MR. DOHERTY: Do you see the point, Judge? You are putting the plaintiffs' negligence and the contributory negligence into the ordinary negligence, in the same category with the negligence of McAlister.

MR. BERLOW: Oh, no. If you can draw instructions clearer than that, I would like to see them.

296 MR. DOHERTY: Well, I can see the point that the Judge had in mind, but it wasn't distinguished between the plaintiffs' negligence, and the type of negligence they go into and the type of negligence that would be McAlister's.

MR. WALSH: There are two different negligences.

MR. BERLOW: I understand that.

MR. WALSH: And they weren't broken down.

MR. BERLOW: They were.

THE COURT: I thought they were. I said, yes, ordinary negligence and I told them what that was and I said, this is not the standard applicable to Mr. McAlister.

MR. BERLOW: And I would like the record to show that you raised your voice, too, when you said that.

MR. DOHERTY: And then you go on to talk about negligence of the plaintiffs, both of them, and you say the same thing, talking about the negligence of McAlister and the negligence of the plaintiffs in the same breath, talking about them as if they were the same, as they are not the same one, for McAlister's is gross negligence or wanton negligence—whichever way you want to put it—and the negligence of the plaintiff is ordinary negligence.

THE COURT: Well, I spelled that out every time.

MR. DOHERTY: You say negligence. You don't say anything else. You haven't distinguished the negligence of the plaintiffs and the defendant. I mean, distinguished between them.

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When you refer to the plaintiffs' negligence is

one thing; when you refer to the defendant's negligence is another thing but you don't distinguish them.

MR. BERLOW: Well, let me put the—your Honor, he had an opportunity to submit instructions. I haven't seen any of his submitted instructions.

I think it is too late for him to request that you read to the—

MR. DOHERTY (interposing) I am not requesting—

MR. BERLOW: (continuing) that you read to the jury an instruction that would emphasize the standard of care in this case.

I think you have read them as a whole and covered the subject adequately. He had his opportunity to correct them before and didn't say—

MR. DOHERTY: (interposing) Before when?

MR. BERLOW: Before the instructions were drafted. I came down with seven of them.

MR. DOHERTY: They weren't any good.

MR. WALSH: Well, the Court indicated that she was going to instruct on the—

MR. BERLOW: (interposing) It is unfair to me.

THE COURT: Well, I guess I will tell them again.

MR. BERLOW: Well then, would you permit me to amend the—

298 THE COURT: (interposing) No, I am not going to permit any amendments at this late date and go back over that.

You had a pretrial just a few days ago and in there you said then that you had twenty-eight hundred and then included that \$800.

MR. BERLOW: Well then,—

THE COURT: (interposing) All right. I will tell them this one thing.

(Counsel for the parties and the others at the Bench

conference then resumed their places before the jury.)

THE COURT: Ladies and gentlemen of the jury, it has been called to my attention that several times I have spoken of negligence on the part of one person or another person.

Now, in referring to negligence insofar as the charge of negligence with respect to Michael or Mrs. Marcley, you are told that the negligence is the failure to use ordinary care. That is the failure to use the care which an ordinarily prudent person would exercise under the circumstances, and that is the doctrine of ordinary care, and that is the doctrine which is applicable to the charge of negligence or contributory negligence on the part of the Marcleys.

Now, I tried to make it clear to you that when reference is made to negligence with respect to Mr. McAlister, that that standard of ordinary care is not applicable to him.

299 The standard with reference to him is he owes the duty to refrain from wantonly or wilfully causing Michael harm, and he owes the duty of not exposing Michael to hidden perils or dangers which Michael could not avoid by reasonable care on his own part.

And he had the duty of maintaining the area of the construction work in a condition which would not unnecessarily or unreasonably expose Michael to danger.

Now, wilful or wanton conduct is conduct characterized by recklessness or disregard for the rights of others and when I referred to negligence on the part of Mr. McAlister, I meant it in the sense of this definition.

That is, you are to determine whether or not he violated his duty, as I have explained his duty to you, and it is only if he had violated the particular duty that I have described to you that he would be guilty of negligence in this case.

You may now retire.

No. 12,136

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

MICHAEL MARCLEY, by his mother and next friend, ELSIE
R. MARCLEY, and ELSIE R. MARCLEY, individually
Appellants

VS.

H. O. McALLISTER

Appellee

**Appeal from the United States District Court
for the District of Columbia**

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED NOV 20 1954

Joseph D. Stewart

CLERK

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No. 12,136

**APPELLEE'S STATEMENT OF QUESTION
PRESENTED**

The only question presented on this appeal is what duty does a contractor owe to an uninvited person going into a building which was under construction.



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Appellants

vs.

H. O. McALLISTER

Appellee

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTER-STATEMENT OF THE CASE

The appellants were the plaintiffs below and the appellee was the defendant below and the parties will be hereafter referred to as they appeared in the trial Court.

The statement of the case presented by plaintiffs in their brief, and the parts of the record covering the testimony printed by the plaintiffs in the appendix to their brief, does not fairly and adequately cover the facts of this case, and it is necessary that the defendant add to this statement and to plaintiffs' appendix.

In April of 1950 the defendant entered into an agreement with the Montgomery County authorities for the construction of an addition to the Somerset School building situated in Bethesda, Maryland. Prior to the commencement of the construction the defendant was in contact with Mrs. Katherine M. Bricker, the principal of the Somerset School, relative to a directive that the school children be requested and required to remain away from that portion of the school grounds where the construction was in progress. There were also discussions with the principal relative to certain barricades to be placed around the property where the proposed construction was to be commenced (App. 55A).

The defendant, in answer to questions by the Court, stated that the barricades were approximately ten feet long and four feet high and that two men could move them alright (App. 51A).

There were ample playground facilities in other portions of the school grounds. This was to the south and to the east of the main school building. The portion of the playground to the east of the main building and the new construction had all kinds of playground equipment and this part of the playground commenced about eighty feet to the east of the new construction. In this eighty feet there was a bank approximately ten feet high sloped up from the playground toward the new construction with a log near the top so that it was well separated from the construction work (App. 50A-51A).

In addition to the foregoing, Mrs. Katherine M. Bricker testified that she had sent around notices to each of the class room teachers directing them to instruct the children to stay away from the construction work. She also stated that adequate barriers were placed there by the defendant (App. 56A-57A).

The testimony in its entirety would indicate that the outside walls of the building were up to the second or third floor at the time of the incident in question (App. 41A).

The testimony of Lyne S. Smith as placed in plaintiffs' appendix 8A-11A was greatly altered by a statement signed by her. There was an indication in her testimony on behalf of the plaintiffs that the ladder was permitted to remain up at night but her written statement contradicted her and it appears in defendant's cross-examination of this witness (App. 27A-37A).

Alfred Higgins, a witness for the defendant, definitely states that it was his job to take down all ladders and bring in all equipment on the job every evening, and that he did it on that evening (App. 53A-54A).

Apparently the infant plaintiff, Billie Dooley and Lyne Smith, for some time prior to the accident, had been over at the new construction every evening after the workmen left and played around in the construction. They threw bricks and other things from the upper floor of the construction. There was also testimony that the infant plaintiff's mother and Mrs. Dooley knew that they were playing around the construction and contrary to the testimony of his mother (App. 8A) (App. 46A).

The testimony is uncontradicted that at the time of the accident the infant plaintiff was attempting to throw a wooden horse from one landing to another (App. 41A-47A).

SUMMARY OF ARGUMENT

The infant plaintiff and his friends went into the new construction after the workmen left for the evening to play and in so doing he became a trespasser, or, at the most, a licensee and to whom the defendant owed only the duty to abstain from wilful or wanton misconduct which would cause him injury.

ARGUMENT

The complaint for damages alleged that the minor plaintiff was injured due to the negligence of the defendant in the construction and maintenance of the Somerset School annex in Bethesda, Montgomery County, Maryland, and his right of action, if any, is governed by the law of the State of Maryland.

Throughout plaintiffs' brief and in the appendix to their brief, the construction work was indicated as a part of the playground upon which children played, but the record is ample to indicate that the playground set aside for the children during school hours was a considerable distance away from the new construction and further that the children had been instructed to remain away from this part of the school grounds. It was also questionable whether the children had any right on the school ground proper after school hours.

The plaintiffs, in their brief on page 13, state that the evidence and testimony establish that McAllister not only did not remove the ladder from the upright position against the scaffolding, but, further, that he did not furnish any barricade, watchman, sign, or anything of the sort to prevent the occurrence of such injury which would have been foreseen by a reasonable man. It is true that this statement would be substantiated by the appendix to plaintiffs' brief, but the added part of the record, which was printed by the defendant, clearly discloses that adequate barricades were placed in and around the new construction by the defendant.

It should be noted that in the testimony of the plaintiff, Mrs. Marcley, and the testimony of Catherine R. Dooley, that they do not state that no barricades were placed around the construction, but merely that they did not see any and Mrs. Marcley stated that she had not looked to

see if there were any barricades from the time the construction started (App. 8A).

Mrs. Dooley in her testimony (App. 11A-15A) indicates that the place where the construction was in progress was not in the playground proper but that it was some distance away.

Plaintiffs, in their brief, discount the law contained in the Maryland cases referred to and go to other states for decisions to support their theory. They still rely upon the fact that the place where the injury occurred was a common playground and that the minor plaintiff was invited to the place where he was injured.

In the recent case of *Carroll v. Spencer*, 104 Atl. Rep. (2d) 628, the Court of Appeals of Maryland discusses very fully the law of Maryland covering injuries to children and covers rather fully all of the outstanding cases on that subject in the State of Maryland.

In this case an eight-year old boy, on his way home from school with other playmates, strayed into a partially finished house which was being built for sale and after playing around the house for a few minutes fell through a hole in the floor and was seriously injured. In the suit for damages by the infant and his father, which were tried together, the Court directed a verdict for the defendants at the close of the plaintiffs' case.

The Court very fully discusses the facts in that case and describes a mud battle between the children and also the fact that the foreman on the job had allegedly seen the children.

The appellants in that case contended that because the appellees intended to sell the house when finished and had posted for sale signs thereon they had extended an invitation to the public to enter to inspect the property and that therefore the children were invitees to whom the

appellees owed the duty of ordinary care. The appellants go further in that case and say that even if the child was a trespasser or bare licensee that the foreman saw the child and there was a duty on the part of the foreman to drive him off the property or to warn him of the danger of the open hole which could be considered a trap.

The Court, in its opinion, among other things, at page 630, made the following statement:

"The appellees agree that the owner of land has a duty not to use his property as a trap, or covertly alter it so as to create hidden peril, to ensnare the unwary. They go on to say that the evidence shows that they did not so do, and shows, as a matter of law, that the appellant was a trespasser to whom they, as the owners of the property, owed no further duty, even though his presence was known, other than to abstain from wilful or wanton misconduct.

We think that under the law which has been established by this Court, stricter than that of many jurisdictions, the appellees' views on both points are sound, and control the decision here.

* * * *

On the second point, admittedly the appellant and his friends went in the premises to play. Whatever the effect of the for sale sign as an invitation to prospective purchasers, clearly it was not an invitation, express or implied, for children to come to play on the property. We find that the appellant was not on the premises in connection with any interest or business of the appellees, immediate or remote, and so was a trespasser. Cf. *Kalus v. Bass*, 122 Md. 467, 89 A. 731, where the injured child accompanied his father, an express invitee, to unsafe premises, and was permitted to recover on the ground that he was at least an implied invitee. The status of the children would not change to that of invitees because the appellees, through their foreman, knew that intruders were on the property and in a position of potential danger by virtue of the unfinished condition of the house, and did not drive them off. Acquiescence is

not invitation, and at most, changes the status of the trespasser to that of bare licensee, to whom the owner owes no greater duty than to a trespasser. *Jackson v. Pennsylvania R. Co.*, 176 Md. 1, 3 A. 2d 719, 120 A. L. R. 1068; *Benson v. Baltimore Traction Co.*, supra; *State, to Use of Lorenz v. Machen*, 164 Md. 579, 165 A. 695; and *Duff v. United States*, 4 Cir., 171 F. 2d 846.

The courts of the country are divided on the law to be applied in the case of a trespasser, or bare licensee, known to be on the property, in suits for negligence against the owner. Under one line of cases, which follow what was known as the Michigan rule, the fact that the trespasser's presence is known, requires the owner to exercise ordinary care as to him. Under what is known as the Massachusetts rule, the owner is under no such obligation. His sole duty is to abstain from intentional injury. The standard, under this rule, includes something more than ordinary inadvertence, and, in essence, is like a wilful, intentional wrong. See *Peaslee, Duty to Seen Trespassers*, 27 *Harvard Law Review*, 403. The Restatement, Torts, Sections 337-339, adopted the essence of the Michigan rule, while Maryland has continued to follow the substance of the Massachusetts rule. This is made clear by *Jackson v. Pennsylvania R. Co.*, supra; and *Duff v. United States*, supra. In the *Duff* case, Judge Soper said for the Court, at page 850 of 171 F. 2d: 'Generally speaking, the owner of land in Maryland owes no duty with respect to the condition of his land to a trespasser, or even to a licensee, whose presence upon the land is known to him, except to abstain from wilful or wanton misconduct. *Benson v. Baltimore Traction Co.*, 77 Md. 535, 26 A. 973, 20 L. R. A. 714, 39 Am. St. Rep. 436. The owner owes no duty to the trespasser or licensee to keep the premises safe or to anticipate his presence and warn him, and the trespasser or licensee acquires no right of recovery except in the case of wilful injury. *Gordon Sleeprite Corp. v. Waters*, 165 Md. 354, 168 A. 846; *Pellicot v. Keene*, 181 Md. 135, 28 A. 2d 826; *Steinwedel v. Hilbert*, 149 Md. 121, 131 A. 44.'

And at page 632 the following:

"We find that the appellees had no actual knowledge of a real and imminent peril of the trespasser, or bare licensee, and that this being so, owed him no duty under the facts of the case. The trial court was right in withdrawing the case from the jury."

This same question was before this Court in the case of Alexander Firfer, et al v. United States of America, 208 Fed. (2d) 524, in which this Court goes very fully into the question of invitees, licensees and trespassers, and in which this Court, in referring to licensees or trespassers, made the following statement:

"They may recover only for intentional, wanton, or wilful injury or the maintenance of a hidden engine of destruction."

In the case of Grube v. City of Baltimore, et al, 132 Md. 355, 103 A. 948, Joseph Grube, a boy between ten and eleven years of age, sued the Mayor and City Council of Baltimore, and the Consolidated Gas, Electric Light and Power Company of that City, for injuries received by him as a result of his climbing upon a pole in a schoolhouse yard owned by the City, which was erected there by the Consolidated Gas Company. The yard was used as a playground by the children who attended the school and others. The Court in the course of its opinion, among other things, made the following statement:

"It may be that in some jurisdictions such a case as this would be required to be submitted to the jury, but there is no decision in this state which would have required or authorized such submission. Children should receive all reasonable protection from the courts, but however much such an injury as this boy sustained is to be regretted, it does not justify mulcting innocent people or corporations in damages for injuries sustained by a boy over 10 years of age who had no right to do what he did do, and who did

it in a way that shows he knew he had no right to do it. Parents are sometimes so situated that they cannot have such supervision over the movements of their children as may be desirable, but they cannot turn them loose and then make other people pay for injuries they bring on themselves, when they are old enough to take care of themselves. The doctrines of attractive nuisances, implied invitations, etc., may be justly applied in some cases, but in this case we can find no just or reasonable ground upon which a recovery can be had."

As in the case of *Carroll v. Spencer, supra*, the infant plaintiff in this case went into the premises to play. They had been going there on other evenings after the workmen left and their purpose was to play and to toss the equipment and material from one part of the construction to another. It was evident that it was no part of the playground and the infant plaintiff was not invited nor was there any invitation, express or implied, on the part of the defendant to this child. It is to be regretted that the child was injured but he was a trespasser or, at the most, a licensee to whom the defendant owed only the duty not to intentionally or wilfully cause him injury or to maintain a trap on the premises. The child was injured, not because of a trap, but when he was attempting to destroy or damage property belonging to the defendant, and, under the circumstances, the instruction of the Court, taken in its entirety, clearly covers the law of Maryland as to the right of the plaintiffs to recover and the plaintiffs were given great latitude by the Court in permitting their case to go to a jury, for it is evident that the defendant's motion for a directed verdict should have been granted.

CONCLUSION

It is respectfully submitted that no error was committed by the trial Court and that the judgment of the jury for the defendant should be affirmed.

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